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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 259.

BENJAMIN P. RUNKLE, APPELLANT,

vs.

THE UNITED STATES.

No. 260.

THE UNITED STATES, APPELLANT,

vs.

BENJAMIN P. RUNKLE.

APPEALS FROM THE COURT OF CLAIMS.

FILED JUNE 23, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 259.

BENJAMIN P. RUNKLE, APPELLANT,

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1 In the Court of Claims.

BENJAMIN P. RUNKLE
vs.
THE UNITED STATES. } No. 14246.

I. *Case transmitted by the Secretary of the Treasury.—Filed January* 31, 1884.

Note by the clerk:

This claim was transmitted by the Secretary of the Treasury to the Court of Claims under section 1063, of the Revised Statutes.

II. *Petition.—Filed March* 12, 1884.

To the honorable the judges of the Court of Claims of the United States:

The petition of Benjamin P. Runkle shows, as follows:

That on the 14th day of September, 1882, the petitioner filed a claim in the office of the Second Auditor of the United States Treasury Department, as an officer of the United States Army, for longevity pay, under what is known as the "Tyler decision," and that said claim is now pending in said Department; that on the 27th day of June, 1883, the Secretary of the Treasury, pursuant to the provisions of section 2 of the act of March 3, 1883, referred said claim to this honorable court for an opinion upon the following questions:

1st. Was the court-martial that tried Benjamin P. Runkle duly and regularly organized, and had it jurisdiction of the person of said Runkle, and of the charges upon which he was tried?

2d. Were the proceedings and findings of said court-martial regular and the sentence duly approved in part by the President of the United States, as required by law?

2 3d. Was Benjamin P. Runkle legally cashiered and dismissed from the Army of the United States, in pursuance of said court-martial and subsequent proceedings?

4th. Was the President of the United States authorized and empowered by Executive order to restore said Runkle to the Army, as it is claimed he was restored by the order of August 4, 1877?

5th. Is Benjamin P. Runkle now a retired army officer, with the rank of major, and, as such officer, entitled to longevity pay, under what is known as the Tyler decision?

To sustain on his part the issue raised by said reference, and to meet the requirements of said act of March 3, 1883, your petitioner respectfully submits:

1st. That he is a citizen of the State of Ohio, and is an officer in the United States Army, retired with the rank of major; that he was mustered in the service as captain of the Thirteenth Ohio Volunteers, on April 22, 1861, and continuing in said service was, by order dated October 6, 1866, appointed as major of the Forty-fifth Infantry, and was, on December 15th, 1870, by General Order No. 119, dated November 25th, 1870, retired from service by reason of incapacity resulting from long and faithful service, and from wounds received. That prior to his retirement as aforesaid, to wit, on the 11th day of April, 1867, by Spec-

ial Order No. 43, military district of Kentucky, this petitioner was directed to report in person to the assistant commissioner for the State of Kentucky for duty in the Bureau of Refugees, Freedmen, and Abandoned Lands. That pursuant to said order he did report as directed, and was assigned for duty in said Bureau; that this petitioner at once entered upon the active discharge of the duties of his new office, and was shortly after his assignment thereto made deputy commissioner of said Bureau for the said State of Kentucky; that as such deputy commissioner he
3 was intrusted with the custody and disbursement of large sums of money, amounting to many thousands of dollars per annum, which said sums were disbursed by this petitioner through such agents, selected and appointed by the War Department and by the Commissioner of said Bureau at Washington. That this petitioner, when retired, as aforesaid, by order of November 25, 1870, requested to be relieved from duty as deputy commissioner, as aforesaid, but his request was refused, and he was compelled, contrary to law and to any regulation, to continue in said office of deputy commissioner until the Bureau or Department of Refugees, &c., was abolished, as was done on or about the 1st day of July, 1872.

2d. That this petitioner, throughout the period of his connection with said Bureau, attended faithfully and conscientiously to the discharge and performance of his duties, which were manifold and responsible, and strictly, and honestly, and fully disbursed and paid out, according to law, all moneys intrusted to his care or which came into his possession, said disbursements and payments being, for the most part, made through agents appointed, as aforesaid, by the War Department and the Commissioner of said Bureau at Washington.

3d. That in the summer or fall of 1872 this petitioner was summoned to appear as a witness before a general court-martial, which was convened at Louisville, Kentucky, August 1st, 1872, by Order No. 146, Adjutant-General's Office, for the trial of Lieutenant John T. Graham and such other persons as might be brought before it. That while this petitioner was before said court as a witness he was placed under arrest, and by said court-martial arraigned, tried, and sentenced to be cashiered upon charges and specifications contained in General Court-Martial Order No. 7, a copy of which said order is filed as evidence in this cause, and is prayed to be read as a part of this petition. That the alleged offenses and illegal acts covered by said charges and specifications grew out of the adminis-
4 tration of the affairs of said Bureau, and were in their nature purely civil, and that they are stated in said specifications to have been committed during a period of time subsequent to the order hereinbefore referred to placing this petitioner upon the retired list of the Army.

4th. That the said court-martial was, as will appear by reference to the order convened, the same filed in this cause as evidence, appointed by the President of the United States, and that neither the general officer commanding the Army, or the department thereof to which this petition belonged, was the accuser of this petitioner before said court-martial. And that the findings of said court-martial and its sentence of this petitioner were never approved by the President of the United States, as will appear by reference to Order No. 7, series 1873, War Department, a copy of which is filed as evidence in this cause.

4½. That this petitioner's request for sufficient time wherein to prepare himself properly to meet said charges and specifications; his demand to inspect his official reports on file at the War Department at Washington, and his appeal for an adequate extension of limits to enable him to make said inspection and to examine other documents and papers bearing upon the case, were all refused and denied by said court and by the authorities at Washington.

5th. That by reason of the findings and sentence of said court-martial, and its approval by the Secretary of War Belknap, this petitioner was, from the date of said sentence and until August 4, 1877, hindered and prevented from enjoying the privileges, dignities, and emoluments of his position as an officer of the United States Army retired with the rank of major; his right even to his rank and position in said Army was denied, his pay withheld, and he was in all respects treated by the Government and its agents as if the sentence of said court-martial was a valid one.

5 6th. That on the 16th day of January, 1873, this petitioner presented to General U. S. Grant, then President of the United States, a petition setting forth that said court-martial, as convened and appointed, had no jurisdiction over this petitioner; that the proceedings of said court had not been approved by the President as required by law; that said conviction was unjust, and that the records of said proceedings was not in form and substance sufficient in law to warrant the issue of said order, and prayed the revocation and annulment of the same; but said petition was not finally acted upon by President Grant during his term of office.

7th. That in 1877 the said petition and application of this petitioner, still pending before the Executive Department, was brought by this petitioner to the attention of President Grant's successor in office, R. B. Hayes, and on the 4th day of August, of said year, the sentence of this petitioner by said court-martial was disapproved by order of said R. B. Hayes, President, and said Order No. 7, series 1873, issued by Belknap, Secretary of War, as far as the same related to this petitioner, was revoked. That on August 15th, 1877, all arrears of pay accrued since January 15th, 1873, was paid to this petitioner, who thereafter, and until the 31st day of January, 1884, continued regularly to draw his pay as an officer in the Army retired with the rank of major.

That in view of the foregoing the petitioner respectfully claims—

First. That the court-martial that tried Benjamin P. Runkle was not regularly organized, and had no jurisdiction of the person of this petitioner, or of the charges under which he was tried.

Second. That the proceedings and findings of said court-martial
6 were irregular, and the sentence thereof was never approved by the President of the United States as required by law.

Third. That this petitioner was not legally cashiered and dismissed from the United States Army.

Fourth. That the President of the United States was authorized and empowered by Executive order to disapprove the findings and sentence of a court-martial never approved or acted upon by him or his predecessor in office, and to revoke the approval thereof made by the Secretary of War without authority of law.

Fifth. That this petitioner is now a retired officer in the United States

Army with the rank of major, and as such officer is entitled to longevity pay, under what is known as the Tyler decision.

That the petitioner has at all times borne true allegiance to the Government of the United States, and has not voluntarily aided or abetted or given encouragement to rebellion against said Government, and he believes that the facts stated in this petition are true.

BEN. P. RUNKLE,
Maj. and B'v't Col., U. S. A. (Retired).

Subscribed and sworn to before me this 3d day of March, A. D. 1884.
[SEAL.] HENRY H. MATHIAS,
Notary Public.

M. F. MORRIS,
Attorney for Claimant.
R. T. MERRICK,
M. F. MORRIS,
Of Counsel.

THE STATE OF INDIANA,
Putnam County, ss:

I, John W. Lee, clerk of the circuit court within and for the county of Putnam aforesaid, do hereby certify that Henry H. Mathias, whose certificate of acknowledgment appears to the petition to which this is attached, was, on the date and at the time of making said certificate, to wit, the 3d day of March, 1884, a notary public within and for said county of Putnam, duly elected, commissioned, and qualified, and that full faith and credit ought to be given to his official acts, and that his signature is genuine.

In witness of which I hereunto affix the seal of said court and subscribe my name, at Greencastle, this 3d day of March, A. D. 1884.
[SEAL.] JOHN W. LEE,
Clerk.

7 III. *Traverse.—Filed March* 13, 1884.

And now comes the Attorney-General on behalf of the United States and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

8 IV. *Counter claim.—Filed March* 13, 1884.

Now come the defendants, by their Asssistant Attorney-General, and say that the said claimant at and before the commencement of this suit was and still is indebted to the defendants in a large sum of money, to wit, twenty-

three thousand five hundred and eighty-five dollars and sixty-two cents ($23,585.62) for moneys paid to the said claimant by the Paymaster-General of the Army and his subordinates without warrant of law, being the pay and allowances of a major in the Army upon the retired list from the fourth day of August, 1877, to January 1st, 1884, during which period the said claimant was not a major in the Army, nor in any way authorized to draw pay and allowances as aforesaid.

Wherefore the defendants pray that judgment may be entered against the said Runkle for the sum of twenty-three thousand five hundred and eighty-five dollars and sixty-two cents ($23,585.62) aforesaid.

THOMAS SIMONS,
Assistant Attorney-General.

9 V. *Findings of fact and conclusions of law.—Filed by the court April 7, 1884.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

April 22, 1861, the claimant was mustered in as a captain of 13th Ohio Volunteer Infantry, and served as such till November 8, 1861, when he was mustered in as major. August 18, 1862, he was honorably mustered out.

August 19, 1862, he was mustered in as colonel of 45th Ohio Volunteer Infantry, and honorably mustered out July 21, 1864.

August 29, 1864, he accepted appointment as lieutenant-colonel of Veteran Reserve Corps, and was honorably mustered out October 5, 1866.

October 6, 1866, he accepted appointment as major of 45th U. S. Infantry, became unassigned, March 15, 1869, and was placed on the retired list as major U. S. Army December 15, 1870.

II.

At the time he was so placed on the retired list he was on duty as a disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands for the State of Kentucky, and had been on that duty from April 11, 1867; and continued on it, without any new assignment to it, until he was arrested for trial before a court-martial, as hereinafter shown.

III.

June 25, 1872, the following Special Order, No. 146, was issued by the War Department:

"1. By direction of the President, a general court-martial is hereby appointed to meet at Louisville, Kentucky, on the 5th day of July, 1872, or as soon thereafter as practicable, for the trial of 2d Lieutenant John L. Graham, 13th Infantry, and such other prisoners as may be brought before it."

Before the court-martial convened and organized under this order, the said Runkle was arraigned and tried on the following charges:

Charge I—"Violation of the act of Congress approved March 2d, 1863, chapter 67, section 1."

Charge II—"Conduct unbecoming an officer and a gentleman."

The specifications presented under these charges were all based on acts alleged to have been done by the claimant while on duty as a disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands. There were thirteen specifications under the first charge and fourteen under the second. All the specifications averred acts done by him in the year 1871, except the 1st and 5th under Charge I, and the 1st, 5th and 14th under Charge II, all of which averred acts done in 1870, before he was placed on the retired list. Of the 1st and 5th specifications under Charge I, and of the 14th under Charge II, he was found guilty. He was also found guilty of ten other specifications under Charge I, and of five other specifications under Charge II, all of which averred acts done by him in 1871. He was also found guilty of both charges; and was sentenced by the court to be cashiered; to pay the United States a fine of $7,500; and to be confined in such penitentiary as the President of the United States might direct, for the period of four years; and in the event of the non-payment of the fine at the expiration of four years, that he should be kept in confinement in the penitentiary until the fine be paid; the total term of imprisonment, however, not to exceed eight years.

IV.

The proceedings, findings, and sentence of said court-martial were transmitted to the Secretary of War, who wrote upon the record the following order:

"The proceedings in the foregoing case of Major Benjamin P. Runkle, retired, United States Army, are approved, with the exception of the action of the court in rejecting as evidence a certain letter written by a witness for the prosecution, and offered to impeach his credibility; also in unduly restricting the cross-examination of the same witness in relation to the motives influencing his testimony.

"Inasmuch, however, as in the review of the case it was determined that the whole testimony of this witness could be excluded from consideration without impairing the force of the testimony for the prosecution, upon which the findings rest, the erroneous action of the court in this respect does not affect the validity of the sentence.

"The findings and sentence are approved.

"In view of the unanimous recommendation by the members of the court that accused shall receive Executive clemency on account of his gallant services during the war, and of his former good character, and in consideration of evidence, by affidavits presented to the War Department since his trial, showing that accused is now, and was at the time when his offense was committed, suffering under great infirmity in consequence of wounds received in battle, and credible representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed.

"WM. W. BELKNAP,
"*Secretary of War.*"

The said Secretary also issued, January 16, 1873, a General Order of the War Department No. 7, series of 1873, announcing the sentence of the court-martial, and that "Major Benjamin P. Runkle, U. S. Army (retired), ceases to be an officer of the Army from the date of this order."

From the date of this order till after August 4, 1877, the claimant's name was not borne upon the Army Register.

V.

August 4, 1877, R. B. Hayes, President of the United States, made the following order:

EXECUTIVE MANSION,
Washington, August 4, 1877.

In the matter of the application of Major Benjamin P. Runkle, U. S. Army (retired).

The record of official action heretofore taken in the premises shows the following facts, to wit:

First. That on the 14th of October, 1872, Major Runkle was found guilty by court-martial upon the following charges, to wit:

CHARGE 1. "Violation of the act of Congress approved March 2, 1863, chapter 67, section 1."

CHARGE 2. "Conduct unbecoming an officer and a gentleman."

Second. That on the 16th of January, 1873, W. W. Belknap, then Secretary of War, approved the proceedings of said court, and thereupon caused General Order No. 7, series of 1873, to issue from the War Department, by which it was announced that Major Benjamin P. Runkle was cashiered from the military service of the United States.

Third. That subsequent to the date of said General Order No. 7, to wit, on the 16th day of January, 1873, Major Runkle presented to the President a petition, setting forth that the proceedings of said court had not been approved by the President of the United States, as required by law; that said conviction was unjust; that the record of said proceedings was not in form or substance sufficient in law to warrant the issuing of said order, and asking the revocation and annulment of the same.

Fourth. That in pursuance of this petition, the record of the
11 official action theretofore had in the premises was, by direction of the President, Ulysses S. Grant, referred to the Judge-Advocate-General of the United States Army for review and report.

Fifth. That thereupon the Judge-Advocate-General reviewed the case, and made his report thereon, in which it is reported and determined, among other things, that in the proceedings had upon the trial of the case by said court, "it is nowhere affirmatively established that he (Major Runkle) actually appropriated any money to his own use."

It also appears in said report that the conviction of said Runkle, upon charge one as aforesaid, is sustained upon the opinion that sufficient proof of the crime of embezzlement on the part of the accused was disclosed by the evidence before the court. And with respect to charge two no reference to the same is made in said report, except to deny the sufficiency of the evidence in the case, for a conviction upon the fourteenth specification thereof; and it is to be observed that the thirteen remaining speci-

fications under this charge are identical with the thirteen specifications under charge one.

The Judge-Advocate-General further finds and determines in said report as follows, to wit: "For alleged failures to pay, or to pay in full," on the part of the subagents, "I am of the opinion that the accused cannot justly be held liable."

Sixth. That no subsequent proceedings have been had with reference to said report, and that the said petition of said Runkle now awaits further and final action thereon.

Whereupon, having caused the said record, together with said report, to be laid before me, and having carefully considered the same, I am of opinion that the said conviction is not sustained by the evidence in the case, and the same, together with the sentence of the court thereon, are hereby disapproved; and it is directed that said Order No. 7, so far as it relates to said Runkle, be revoked.

R. B. HAYES.

At the time of the issue by President Hayes of this order, the number of officers on the retired list of the Army was 300, and continued so until November 19, 1877. During that period the claimant was carried on the Army records as additional to the number of retired officers allowed by law, until a vacancy occurred on said last-named date; since which date he has been borne on the retired list, and up to January 1, 1884, has drawn pay to the amount of $23,585.62. Of this sum $9,195.27 was paid to him August 15, 1877, for the period from January 16, 1873, the date of the order signed by Secretary Belknap, to the 4th of August, 1877, the date of the order of President Hayes.

VI.

August 7, 1877, the claimant addressed a letter to the Paymaster-General of the Army, asserting his legal right to pay as a retired major for the period of time between the dates of those two orders. This letter the Paymaster-General referred to the Secretary of War, with the following endorsement:

"Respectfully forwarded to the Hon. Secretary of War.

"It has been enjoined that questions of payment in such cases shall be submitted to the Secretary of War. See letter of July 7, 1863, from Col. J. A. Hardee, asst. adjt. general, to the Paymaster-General, stating the orders of the War Department, that 'an officer restored to the service either by the revocation of the order of dismissal or discharge, or by simple restoration, is not entitled to pay for the period that he was out of service, unless the same is expressly ordered by the War Department.'

"The language of the Judge-Advocate-General on this point is to the same effect. (See Judge-Advocate's Digest of 1868, pg. 266.) 'Where an order of the War Department for the dismissal, discharge, or muster-out of an officer is subsequently revoked, and he reinstated in his former rank and position, it is competent for the President, in his discretion, to allow him pay for the interval during which he was illegally separated from the service under the original order.'

"The course of military administration has, however, developed no pre-

cise rule on this subject, each case of a claim for pay by such an officer having been, in practice, determined by the special circumstances surrounding it.

"BENJ. ALVORD,
"*Paym'r-General U. S. Army.*

"P. M. G. OFFICE, *Aug.* 9, 1877."

12 The Secretary of War returned the letter to the Paymaster-General, through the Adjutant-General, and when it reached the Paymaster-General it had on it the following endorsements:

"Respectfully returned (through the Adjutant-General) to the Paymaster-General.

"By the order of the President of Aug. 4th, 1877, the approval of the proceedings and sentence in the case of Major B. P. Runkle, of date January 16, 1873, was revoked, the said proceedings and sentence were disapproved, and the order of dismissal was set aside.

"This order of the President must be accepted by this Department as revoking said order of dismissal from its inception and as annulling all its consequences. As Major Runkle was, at the time of his trial and sentence, an officer of the retired list, the fact that he has not been on duty in the interim can make no difference, since a retired officer is not subject to duty.

"He will, therefore, be paid, whenever funds are available for that purpose. This indorsement has been submitted to and is approved by the President.

"GEORGE W. McCRARY,
"*Secretary of War.*

"WAR DEPT., *Aug.* 13, '77.

"Noted and respectfully forwarded.

"E. D. TOWNSEND,
Adj't Gen'l.

"AUG. 14, '77."

Upon receiving back the said letter with said endorsements, the Paymaster-General made thereon this endorsement:

"Respectfully referred to Major Alexander Sharp, P. M., U. S. A. Present. Maj. Runkle was last pair to include Jan. 15, 1873.

"CHAS. T. LARNED,
"*Acting Paym'r Gen'l U. S. Army.*

"C. T. L., P. M. G. O., *Aug.* 15, 1877."

It was in obedience to the order of the President, signified by the above endorsement of the Secretary of War, that the claimant was paid the aforesaid sum of $9,195.27.

Upon the foregoing facts the conclusions of law, upon the grounds taken in the following opinion, are—

1. That the claimant is not entitled to recover longevity pay.

2. That the defendants are not entitled, under their counter-claim, to recover the pay received by the claimant as a retired major, which accrued after the 4th of August, 1877, amounting to $14,390.35.

3. That the defendants are entitled, under their counter-claim, to recover of the claimant $9,195.27, being the amount paid him for the time between January 16, 1873, and August 4, 1877.

VI.—*Opinion of the court.*

DRAKE, Ch. J., delivered the opinion of the court.

On the 15th of December, 1870, the claimant, then major 45th U. S. Infantry, was on duty as disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands for the State of Kentucky; which duty he had been performing, under military orders, for more than three years prior to that date.

On that day he was, by order of the President, placed on the retired list as major, but continued to perform that duty until the autumn of 1872, when he was arrested for trial before a general court-martial, appointed by direction of the President, and convened at Louisville, Ky.

13 Before that court the claimant was arraigned and tried on two charges—I. "Violation of the act of Congress approved March 2, 1863, chapter 67, section 1;" and II. "Conduct unbecoming an officer and a gentleman."

He was found guilty, October 14, 1872, of both charges, and was sentenced by the court to be cashiered, to pay a fine, and be imprisoned in a penitentiary for the period of four years.

The proceedings, findings, and sentence of the court-martial were transmitted to the Secretary of War, who wrote upon the record thereof the following order:

"The proceedings in the foregoing case of Major Benjamin P. Runkle, retired, United States Army, are approved with the exception of the action of the court in rejecting as evidence a certain letter written by a witness for the prosecution, and offered to impeach his credibility, also in unduly restricting the cross-examination of the same witness in relation to the motives influencing his testimony.

"Inasmuch, however, as in the review of the case it was determined that the whole testimony of this witness could be excluded from consideration without impairing the force of the testimony for the prosecution, upon which the findings rest, the erroneous action of the court in this respect does not affect the validity of the sentence.

"The findings and sentence are approved.

"In view of the unanimous recommendation by the members of the court that accused shall receive Executive clemency on account of his gallant services during the war, and of his former good character, and in consideration of evidence by affidavits presented to the War Department since his trial, showing that accused is now, and was at the time when his offense was committed, suffering under great infirmity in consequence of wounds received in battle; and credible representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be duly executed.

"WM. W. BELKNAP,
"*Secretary of War.*"

On the 16th of January, 1873, the War Department issued General Order No. 7, announcing the sentence of the court, and that from that date the claimant ceased to be an officer of the Army.

From the date of this order till after August 4, 1877, the claimant's name was not borne on the Army Register.

On the last-named date President Hayes made the Executive order set forth in Finding V, disapproving the conviction and sentence of the court, and directing that the said General Order No. 7 should be revoked.

From the date of this order to January 1, 1884, the claimant has drawn pay as a retired major, to the total amount of $23,585.62; of which $9,195.27 was paid him August 15, 1877, for the period from January 16, 1873, the date of General Order No. 7, to the 4th of August, 1877, the date of President Hayes's order.

Upon the facts thus stated in condensed form, but which are more fully set forth in the findings, have arisen the questions which have been submitted for our decision.

The claimant sues for longevity pay, basing his claim on the decision in Tyler's Case (16 C. Cls. R., 223; 105 U. S. R., 244).

His contention is, that he was not, in law, at any time, out of the Army. In support of this position he takes the following grounds:

I. That the court-martial before which he was tried was not lawfully appointed, and therefore had no jurisdiction to try him.

II. That even if lawfully appointed, it had no jurisdiction of the charges and specifications alleged against him.

III. That the sentence of the court-martial was never confirmed by the President.

14 IV. That the sentence was disapproved, and the War Department's order No. 7 revoked, by order of President Hayes; which it is claimed was the only Presidential action ever had on the proceedings of the court.

We will consider these propositions in their order.

I. That the court-martial was not lawfully appointed. If this position be sustained, then, of necessity, the whole proceedings of the court were unlawful, and had no effect to remove the claimant from the Army.

The sole ground taken in support of it is, that the court was appointed by the President, when it should have been appointed by a "general officer commanding the Army of the United States, a separate army, or a separate department."

To sustain this position the claimant relies on the 72d Article of War, as found in the Revised Statutes; but that article has no bearing on this case, because it was not in existence when the court-martial was convened, but came into force in the Revised Statutes, June 22, 1874. The substance of it was in force, but not in those words, when the court was held that tried and sentenced the claimant. We must therefore go back of that time to find the exact terms of the law which then existed.

In the act of April 10, 1806, "for establishing rules and articles for the government of the armies of the United States" (2 Stat. L. 359, ch. 20), was established, for the first time after the adoption of the Constitution, a body of such rules and articles, among which was the following:

"ARTICLE 65. Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial,

whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be."

This article remained unchanged until May 29, 1830, when an act was passed to alter and amend it (4 Stat. L., 417, ch. 179), as follows:

"SECTION 1. Whenever a general officer commanding an army, or a colonel commanding a separate department, shall be the accuser or prosecutor of any officer in the Army of the United States, under his command, the general court-martial for the trial of such officer shall be appointed by the President of the United States.

"SEC. 2. The proceedings and sentence of the said court shall be sent directly to the Secretary of War, to be by him laid before the President for his confirmation or approval or orders in the case.

"SEC. 3. So much of the sixty-fifth article of the first section of the 'Act for establishing rules and articles for the government of the armies of the United States,' passed on the 10th of April, 1806, as is repugnant hereto, be, and the same is hereby, repealed."

Article 65 and this act were in force when the court-martial was appointed and when it sat, and they continued in force until superseded by Article 72, as a part of the Revised Statutes.

Had they been before the claimant's counsel at the argument, he would, we suppose, have taken the same position that he took in reference to article 72, namely, that, aside from the act of May 29, 1830, the President had no authority to appoint a court-martial under any circumstances. In our opinion such a position cannot be maintained.

15 By the Constitution the President is the Commander-in-Chief of the armies of the United States. Courts-martial are the creatures of orders, the power to convene them being an attribute of command. As Commander-in-Chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by the Articles of War. This general power has been exercised in repeated instances by the President since the formation of the Government. Indeed, if the same could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the Army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department commander, as for example, a large proportion of the officers of the general staff, and the whole body of the retired officers. The authority of the President to appoint general courts-martial has in fact been exercised, from time to time, from an early period, in a series of cases, commencing with those of Brig. Gen. Hull, Maj. Gen. Wilkinson,

and Maj. Gen. Gaines, tried in 1813–1816, and including that of Bvt. Maj. Gen. Twiggs, tried in 1858. (Winthrop's Digest, 200, 388; Ives's Military Law, 30.)

Our opinion then is, that the President's order appointing the court that tried the claimant was a lawful order, and therefore that the first point of objection raised by the claimant against the action of that court is untenable.

II. The second point is, that even if the court was lawfully appointed, it had no jurisdiction of the charges and specifications on which the claimant was tried. If this be so, then the whole proceedings of the court were a nullity, and the claimant never was put out of the Army.

Two grounds were taken at the argument in support of this position. The first was, that the charges upon which the claimant was tried did not constitute a "case arising in the land or naval forces;" and as the Constitution limits the jurisdiction of courts-martial to cases so arising, and as the offense charged must be military in its nature, and committed while in the military service, and as the claimant's duties while connected with the Bureau were purely civil, and as that Bureau was not a branch of the military service, therefore the court had no jurisdiction of the charges. These are positions which should be carefully considered.

And first, as to the constitutional question. Article V of the Amendments to the Constitution declares that—

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Can this be regarded as a limitation upon the jurisdiction of courts-martial? We are quite unable to see it in that light. On the contrary, is it not, in effect, an express constitutional affirmation and preservation of the unlimited right of administration of military justice through military tribunals, without the agency of grand juries? It so seems to us.

The great and fundamental proposition of that amendment is, that "no person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a grand jury."

16 Standing alone, that would have extended to crimes of those descriptions committed in the Army or Navy; and no officer or man in either service could ever have been tried for such a crime, "unless on a presentment or indictment of a grand jury." From this would have resulted, beyond question, great confusion and serious obstruction of justice.

To avoid that was, doubtless, the very intent of adding the words "except in cases arising in the land or naval forces." The effect of those words is very plain. It is as if the Constitution had, in terms, said that as to such cases in those forces, whether of "capital or otherwise infamous crime," or of any lower grade of offense, no presentment or indictment of a grand jury shall be necessary, and they shall be dealt with according to military law. Hence that amendment, instead of limiting the jurisdiction of courts-martial, leaves it to be exercised to the fullest extent, under such "rules for the government and regulation of the land and naval forces" as Congress might, under the power given to it by the Constitution, see fit to prescribe.

So far then as the constitutional point is concerned, we are of the opinion that it has no relevancy to the question of the jurisdictional right of

the court over the subject-matter of the charges on which the claimant was tried, except to sustain that right.

But in this connection the claimant contends that the offense for which he could be lawfully tried before a court-martial must have been military in its nature, and that his employment in time of peace upon purely civil duties in connection with the Bureau, though under military orders, did not subject him to the jurisdiction of a court-martial.

In considering this point the first thing to be ascertained is whether the orders under which he performed those duties were authorized by law.

March 3, 1865, was passed the "Act to establish a Bureau for the relief of Freedmen and Refugees" (13 Stat. L. 507, ch. 90). In section 3 of that act is this sentence:

"And any military officer may be detailed and assigned to duty under this act without increase of pay or allowances."

This is all that the act contains in regard to military officers. There is in it no attempt to distinguish between military and civil duties, nor any specification of what kinds of duty such officers might be required to perform; but the broad authority to assign them to "duty under this act;" that is, to any duty which the act authorized to be performed by any one. The claimant obeyed the order given him to report for duty in the Bureau, and he remained on duty there from April, 1867, to the autumn of 1872, when he was arrested for trial—a period of more than five years, without, so far as appears, ever objecting that he was unlawfully assigned to that duty. Not only so, but he submitted to trial on charges alleging offenses committed while on that duty, without, so far as shown, once urging in defense that his duty in the Bureau was civil and not military, and therefore that the court had no jurisdiction to try him under those charges. Had he attempted such a defense, the answer might have been fourfold: 1. That the question was not whether the services he rendered while on that duty were, as now contended, purely civil and clerical, but whether they were rendered by him as a military officer, acting under lawful military orders. 2. That whatever service a military officer is lawfully ordered by his superior officer to perform is, in the eye of the law, a military service,

though when performed by a private citizen, under the employment
17 of others, it would be a purely civil service. It is the military character of the officer, acting under lawful military orders, which makes the duty a military one, whatever may be the particular description of work involved in the performance of that duty. 3. Whether the duty he was assigned to was military or civil had no bearing on the question of jurisdiction of the court over the subject-matter of the charges and specifications preferred against him, alleging offenses committed by him while on duty. If he had set up as a bar to the jurisdiction of the court that the order assigning him to duty in the Bureau was unlawful, he would have been rightly informed, we doubt not, that that was a matter of defense against the charges, and had no connection with the question of the court's jurisdiction. 4. That whether, while on duty, he was performing one kind of work or another, he was liable as a military officer to answer the charges.

In our judgment, the objection to the jurisdiction of the court-martial, based on the supposed non-military character of the services performed by the claimant in the Bureau has no foundation in law or reason.

The remaining objection to the jurisdiction of the court of the subject-matter of the charges is based on the fact that the acts constituting the offenses charged against him were done by him while he was on duty after the expiration of thirty days from the passage of the act of January 21, 1870 (16 Stat. L., 62, ch. 9), providing—

"That no retired officer of the Army shall hereafter be assigned to duty of any kind, * * * and all such assignments heretofore made shall terminate within thirty days from the passage of this act."

The claimant insists that his retention on duty in the Bureau after he was put on the retired list, December 15, 1870, was in plain violation of that act; that his duties, after that day, were illegally forced upon him; and that misconduct and offenses committed in the performance of duties illegally imposed do not subject a soldier, even in actual service, to the jurisdiction of courts-martial.

The first question here is, whether his retention on duty in the Bureau was in fact a violation of that law. Without undertaking to pass definitively on that point, we are content with simply noting the fact that the law does not specify a case like that of the claimant. Let it be remembered that he was assigned to duty in the Bureau April 11, 1867; was on duty when that act was passed January 20, 1870; was still on duty when he was placed on the retired list December 15, 1870; and remained on duty, without any new assignment to it, till he was arrested for trial in the autumn of 1872.

The act prohibited future assignments of retired officers to duty; which did not touch the claimant's case; for he was not assigned to duty after the act was passed.

The act declared that all assignments of such officers to duty, which had been made before its passage, should terminate within thirty days thereafter. Neither did this touch the claimant's case; for when he was assigned to duty, and also when the act was passed, he was on the active list.

Such being the case, we can see how it might well be questioned, if necessary, whether the act at all reached the case of an officer retired nearly eleven months after its passage, at a time when he was on duty, and was simply allowed to continued on that duty. But it is not necessary to the decision of the matter now under consideration, that we should de-
18 cide that point one way or the other. There is another view of the subject which, in our judgment, settles this question.

This objection is founded on the assumed fact that the offenses charged against the claimant, and of which he was convicted, were committed after he was retired, and therefore that the court had no jurisdiction of them. If this were wholly true in fact we might have to meet the question now raised, but it is not wholly true. Under charge I there were two specifications (the 1st and 5th), and under charge II there was one (the 14th), each averring acts done by him in 1870, before he was retired; and of those three specifications he was found guilty, as he was also of both charges. This was enough to uphold the sentence of the court, for those specifications related to a time when there was not the least ground for disputing the right of the court to try him on them under those charges.

Furthermore: By section 18 of the act of August 3, 1861, "providing for the better organization of the military establishment" (12 Stat. L. 287, ch. 42), it is declared that officers of the Army "partially retired," that

is, "placed on the list of retired officers," "shall be subject to the Rules and Articles of war, and to trial by general court-martial for any breach of said articles;" and article 83, in force when the claimant was tried, said that—

"Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman shall be dismissed the service."

So, as a retired officer, he was subject to be tried by a court-martial; and as to the second charge, it was not at all necessary to his conviction that the "conduct unbecoming an officer and a gentleman" should have been shown when he was on duty. Winthrop's Digest (p. 39) says on this point:

"It is not necessary that the act or conduct of the officer should be immediately connected with or should directly affect the military service. It is sufficient that it is morally wrong and of such a nature that, while dishonoring or disgracing him as a gentleman, it compromises his character and position as an officer of the Army."

This disposes of the last of the claimant's objections to the jurisdiction of the court-martial. We decide against them all, and pass to other and graver matters.

As we have seen, the 65th article of war provided that no "sentence of a general court-martial, in the time of peace, extending to the * * * dismission of a commissioned officer * * * shall be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval and orders in the case."

The proceedings of the court in the claimant's case were transmitted to the Secretary of War during the Presidency of Ulysses S. Grant, and on the 16th of January, 1873, the Secretary wrote thereon the order set forth in finding IV, and also in this opinion.

The question is, whether by this order it appears that President Grant confirmed the sentence of the court. The claimant contends that it does not, and insists that the supposed confirmation was merely the act of the Secretary, and not that of the President, and so was no confirmation at all. It cannot be denied that this raises a question of no ordinary significance in the administration of military law; but we think it not of very great weight.

19 In the first place, it is important to note that there is not, nor ever was, any law requiring the President's confirmation of the sentence of a court-martial to be attested by his sign manual.

In the next place, referring to the act of August 7, 1789, "to establish an Executive Department, to be denominated the Department of War" (1 Stat. L., 49), substantially retained in section 216 of the Revised Statutes, we find that the Secretary of War is to perform and execute such duties as shall be enjoined on or entrusted to him by the President relative to the land or naval forces, and to conduct the business of the War Department in such manner as the President shall, from time to time, order and instruct.

We need not discuss the relations established between the President and the Secretary of War by that act; for that matter was long ago settled by the Supreme Court of the United States, and we have only to refer to its rulings.

In Wilcox vs. Jackson (13 Peters, 498), the question was whether an order of the Secretary of War directing certain public lands to be reserved for military purposes, was authorized under a statute declaring all lands exempted from pre-emption which are reserved from sale by order of the President. The Supreme Court held the order of the Secretary of War to be in law that of the President, and the opinion of the court uses this language:

"Although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several Departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently, that the reservation thus made was in legal effect a reservation made by order of the President, within the terms of the act of Congress."

In United States v. Eliason (16 Peters, 291), the question was whether a regulation promulgated by the War Department was the act of the President, and the court said:

"The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders promulged through him must be received as the acts of the Executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority."

After these decisions it cannot, in this court at least, be considered an open question, whether an approval of the proceedings and sentence of a court-martial, announced by an order of the Secretary of War, as in this case, is to be regarded as the act of the President.

It is not without use, in this connection, to refer to Army precedents in like cases. We have obtained from the Department of Justice a copy of an unpublished opinion given June 6, 1877, by Attorney-General Devens to President Hayes in regard to the case of the claimant; from which, with the permission of the head of that Department, we make the following extracts, embodying historical facts of interest and value:

"It is remarked by Major Runkle's counsel, in a printed argument filed with the papers, that 'all of our earlier Presidents signed the approval of such sentences, and it is believed that it was only during the last Administration that the contrary practice prevailed.'

"But I have before me several instances of the 'contrary practice' happening prior to 1860, one of which occurred nearly half a century ago.

"Thus, in the case of First Lieutenant William S. Colquhoun, 7th Infantry, who was tried by court-martial and sentenced to be cashiered in 1829, the determination of the President (which confirmed the sentence, except as to the disqualification from thereafter holding any office in the Army) was signified through the Secretary of War, Mr. Eaton, in a statement signed by the latter, purporting to be 'by command of the President.'

"So, in the case of First Lieutenant R. M. Cochrane, 4th Infantry, who, in 1844, was sentenced to be cashiered by a court-martial, the de-

termination of the President, confirming the sentence, was signified through the Secretary of War, Mr. Wilkins. Here the latter made known the action of the President by indorsing upon the record of the proceedings and signing the following brief statement: 'The proceedings, finding, and sentence of the court are approved. Nov. 28, 1844.'

"So, in the case of Major George B. Crittenden, Mounted Riflemen, who was sentenced to be cashiered by a court-martial in 1848, the determination of the President, confirming the sentence, was announced through the Secretary of War, Mr. Marcy, by a statement indorsing upon the record, and signed by the latter, which reads thus: 'The President approves of the proceedings and sentence in the case of Major Crittenden, and directs the proper order to be issued thereon.'

"So, in the case of Brevet Lieutenant-Colonel William R. Montgomery, major, 2d Infantry, who, in 1855, was sentenced by a court-martial to be dismissed the service, the determination of the President, confirming the sentence, was in like manner signified through the Secretary of War, Mr. Davis.

"So, in the case of First Lieutenant John N. Perkins, 1st Cavalry, who, in 1859, was sentenced by a court-martial to be cashiered, the action of the President, confirming the sentence, was in like manner signified through the Secretary of War, Mr. Floyd.

"I am informed by inquiry at the office of the Judge-Advocate-General that numerous instances have occurred since the case last mentioned in which the determination of the President confirming sentences of dismissal by court-martial has been signified and attested in the same way."

We might go further and point to what seems to us to be incontrovertible internal evidence in Secretary Belknap's order of its expressing not his, but President's Grant's, decision; but this opinion has been extended to such length that we forbear to discuss that subject. Our unhesitating judgment is, that the finding and sentence of the court were legally confirmed by President Grant, and that from the date of the official promulgation of their confirmation the claimant ceased to be an officer of the Army.

The final question raised by the claimant is connected with the action of President Hayes in his order of August 4, 1877, disapproving the sentence of the court-martial and revoking General Order No. 7 of the War Department.

Proceeding upon the assumption that "W. W. Belknap, Secretary of War, approved the proceedings of said court, and thereupon caused General Order No. 7, series of 1873, to issue from the War Department," President Hayes, as appears in his order, caused the record to be laid before himself, and "having carefully considered the same," was "of opinion," [not that the court was without jurisdiction to try the claimant, but] "that the said conviction is not sustained by the evidence in the case," and thereupon disapproved the conviction and sentence, and revoked General Order No. 7.

Was this a lawful exercise of the executive power vested in him as President of the United States? We are clear in the conclusion that is was not. No such authority is expressly conferred upon him by statute, nor is it by any constitutional definition of his powers, nor can it be legitimately inferred from any written law.

The only revisory power over the proceedings of courts-martial vested by

law in the Executive when President Hayes took the action referred to was that conferred by the 65th Article of War, and that was simply to "confirm or disapprove." Either confirmation or disapproval in such a case is a single and isolated act, intended to produce a single effect, absolute in its purpose and result, complete when it is done, and with no authority
21 vested in the Executive, by any written law, to recall, revoke, or modify the official act of confirmation or disapproval. Wherever a naked power is given to a public officer to do a single particular act in a single defined case, it may be laid down as an axiomatic rule, that when the act is once done the power is exhausted. Take, for instance, the President's right to approve a bill passed by Congress, a single act complete in itself. Has it ever been dreamed that after a bill had been approved and placed in the national archives the approval could be retracted? And yet why not, if the President may revoke the approval of a court-martial's sentence? And if he can set aside an executive confirmation of a conviction and sentence, why may he not annul an executive disapproval of them, and require the sentence to be executed? If he can revoke a confirmation by his immediate predecessor, why not one made by any preceding President? If he can, as in this case, go back and take up a sentence that had been confirmed and executed more than four years and a half before, and revoke it, why not do so after the lapse of any number of years? But we need not press questions or illustrations further. Our judgment is that the act of President Hayes, purporting to revoke the sentence which President Grant had confirmed, was without authority of law, null, and void, and therefore could not possibly confer any right on the claimant to restoration to the Army.

If anything more were needed to sustain this view, it could be found in the fact that when President Hayes's order was made, the number of officers on the retired list allowed by law, to wit, three hundred, was full, and there was, therefore, no place on the list for the claimant; and he was, without authority of law, borne on the Army records as additional to that number until November 19, 1877, when a vacancy occurred.

If our conclusions be correct, it necessarily follows that the claimant cannot recover longevity pay in this suit, because his claim for it must be based on his being in office de jure as well as de facto. When he sues here for that pay he asserts a legal right; which, of course, cannot be sustained by mere occupancy of the office, but must be upheld by a legal title to it, or no judgment in his favor for the pay of the office can be rendered. (People vs. Tieman, 30 Barbour, 193; People vs. Hopson, 1 Denio, 574; People vs. Nostrand, 46 New York, 375; Dolan vs. Mayor, 68 ibid., 274; Riddle vs. Bedford, 7 Serg. & Rawle, 386; Dorsey vs. Smyth, 28 California, 21; Stratton vs. Oulton, ibid., 44; Carroll vs. Siebenthaler, 37 ibid., 193; Meagher vs. Storey, 5 Nevada, 244.)

The only remaining matter to be disposed of is the defendants' counterclaim for all the money received by the claimant as pay since his supposed restoration to the Army on the 4th of August, 1877, shown by the findings to have been $23,585.62 from that date up to January 1, 1884.

Of this sum, $9,195.27 was received by him from Army paymasters, for the period from January 16, 1873, to August 4, 1877, during all of which time we hold him not to have been in the Army at all, either de jure or de facto.

As appears in the findings, that money was paid him by the express

orders of President Hayes. That order, of course, justified the paymasters in making the payment; but did it preclude the United States from asserting the illegality of the order? We are of the opinion that it did not.

If we are right in holding President Hayes's order of August 4, 1877,
22 to have been illegal, null, and void, then, inevitably, his order that the claimant should be paid for the time he was out of the Army wae equally illegal, null, and void.

In regard, however, to the pay received by the claimant for the time between August 4, 1877, and January 1, 1884, a different question is presented. By the act of the President the claimant, so far as the Executive Departments of the Government were concerned, was restored to his place in the Army, and was an officer de facto, though, if our views herein expressed be correct, he was not so de jure. In the cases of Miller, Montgomery, and Palen, just decided, we have held that pay received by a de facto officer cannot be recovered back by the Government, and we so hold in this case. So much, therefore, of the counter-claim as includes the sum of $14,390.35 is disallowed.

The decision of the court is that the claimant is not entitled to recover any longevity pay; that the defendants are not entitled to recover $14,390.35 of the counter-claim, but are entitled to recover the remaining $9,195.27; and judgment will be entered accordingly.

VIII.—*Final judgment of the court.*

At a Court of Claims held in the city of Washington on the 7th day of April, A. D. 1884, judgment was ordered to be entered as follows:

The court, on due consideration of the premises both for and against the Government and the claimant upon the petition of the claimant and the counter-claim of the defendants, finds, upon the whole case, that the claimant is indebted to the Government in the sum of nine thousand one hundred and ninety-five $\frac{27}{100}$ dollars, and do order, adjudge, and decree that the United States do have and recover of and from the said Benjamin P. Runkle the sum of nine thousand one hundred and ninety-five dollars and twenty-seven cents ($9,195\frac{27}{100}$).

23 VIII.—*Application of claimant for, and allowance of, appeal to the Supreme Court of the United States.*

BENJAMIN P. RUNKLE
v.
THE UNITED STATES. } No. 14246.

The claimant, Benjamin P. Runkle, comes, by M. F. Morris, his attorney of record, and moves the court that he be allowed an appeal to the Supreme Court of the United States from the judgment entered by this court in his cause aforesaid.

And for grounds of this his motion, he says that the questions involved in his said cause are of very great importance and ought to be definitely settled by the court of last resort.

M. F. MORRIS,
Attorney for Claimant, Benj. P. Runkle.

Filed April 14, 1884.

And now, to wit, April 14, 1884, it is ordered by the court that the appeal be allowed as prayed for.

24 IX.—*Application of defendants for and allowance of an appeal to the Supreme Court of the United States.*

BENJAMIN P. RUNKLE
vs.
THE UNITED STATES. } No. 14246.

From so much of the judgment in the above-entitled cause as directs that defendants' counter-claim for $14,390.35 be dismissed, rendered April 7th, 1884, the defendants, by their Attorney-General, on the 21st day of April, 1884, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Asst. Att'y-General.

Filed April 21, 1885.

And now, to wit, April 21, 1884, it is ordered by the court that the appeal be allowed as prayed for.

25 In the Court of Claims.

BENJAMIN P. RUNKLE
vs.
THE UNITED STATES. } No. 14246.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for the allowance of appeal to the Supreme Court of the United States and the order allowing same, of the application of the defendants for the allowance of appeal to said Supreme Court and the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this twenty-fourth day of May, A. D. 1884.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 259. Benjamin P. Runkle, appellant, vs. The United States; and No. 260. The United States, appellant, vs. Benjamin P. Runkle. Court of Claims. Filed 23rd June, 1884.

122-543

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JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

Nos. 259 and 260.
Benjamin P. Runkle, Appellant,
vs.
The United States.

Appeal from the Court of Claims.

ARGUMENT BY DONN PIATT,

Of Counsel for Appellant.

Citizen and Gazette Print, Urbana, Ohio.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

Nos. 259 and 260.
Benjamin P. Runkle, Appellant,
vs.
The United States.

Appeal from the Court of Claims.

ARGUMENT FOR APPELLANT.

MAY IT PLEASE THE COURT:—

The Record shows that the Court-Martial which tried Benjamin P. Runkle was appointed by the President of the United States; that Benjamin P. Runkle was at the date when said court was convened a Major on the retired list of the United States Army; that the offenses for which he was tried were alleged to have been committed in the State and Department of Kentucky [illegible]t he was tried before a court assembled in said State and Depa[illegible]ent, and that the General commanding said State and Department was not his accuser or prosecutor.

The Appellant claims that the President of the United States had no authority for appointing a Court-Martial in a case under such state of facts, that the Court of Claims erred in so holding and that the acts and judgment of said Court-Martial are for this, and other causes, void—"not voidable but void."

The law governing the appointment of Courts-Martial at the date when the court in question was convened, June 25, 1872. was to be found in the Act of Congress of April 10, 1806 [2 Stat. L. 359, Ch. 20] which provided:

"Any general officer commanding an army, or Colonel command-"ing a separate department, may appoint general Courts-Martial "whenever necessary."

And in the Act of Congress of May 29th 1830 [4 Stat. L 417, Ch. 179] which provided:

"SEC. 1. Whenever a general officer commanding an army, or "Colonel commanding a separate department shall be the accuser "or prosecutor of any officer in the Army of the United States, "under his command, the general court-martial for the trial of such "officer shall be appointed by the President of the United States.

"SEC. 2. The proceedings and sentence of said Court shall be "sent directly to the Secretary of War, to be by him laid before "the President for his confirmation, or approval or orders in the "case.

"SEC. 3. So much of the sixty-fifth article of the first section of "the "Act for establishing rules and articles for the government of "the Armies of the United States," passed on the 10th of April, "1806, as is repugnant hereto, be, and the same is hereby, re-"pealed."

Here we have provision against the same officer being the accuser and appointing the Court.

The appellant therefore claims that under this State of the law, no general officer commanding an army or any other officer commanding a separate department having been the "accuser or prosecutor" of Major Runkle the President of the United States had no authority to convene the Court-Martial.

If the case is to be governed by these statutes, if they contained the only authority for appointing Courts-Martial then General A. H. Terry commanding the Department was the officer, and the only officer, legally authorized to convene the Court. These Statutes provided how and by whom Court-Martial, should be appointed, and gave the President power to apoint only in one single class of cases. Major Runkle's case did not come under this class.

It may be claimed that Lieutenant Clapp whose name appears appended to the charges acted, in preferring the same, under the order of the Secretary of War. But nowhere is there any authority for the Secretary of War to make any such order or to prefer any charges, and this claim places that officer in the unjust and illegal position of preferring the charges and reviewing the proceedings of the Court that acts on the same.

But if the act of the Secretary of War is the act of the President, as has been claimed heretofore in the case, and may be admitted

as far as matters *merely executive* are concerned, then these charges are the work of the President, and it is against all sense of fair play and the disinterested adminstration of justice that the President should have appointed the Court, thus bringing about the very combination of acts to prevent which the only Statute under which he had any power to appoint whatever, was enacted, to-wit: The same official acting as accuser and appointer of the court. The Statute of May 29, 1830, was unquestionably passed for the reason that it is against every sense of right that a man's accuser "shall have any power in or concerning his trial either in being his judge or selecting his judges." "Such," in the words of an eminent jurist, "is the philosophy, the wisdom and justice, and the sense of fair play which makes the foundation of this Statute. The animus of this act of May 29, 1830, was one of solicitude to protect the accused. May he not need such protection as much against those high in authority as against subordinates?

A history of the official acts of those high in authority, taken from the records in this case will furnish a clear and emphatic answer to this question. It will be found on page?

In this Statute of May 29, 1830, "the word 'commander' refers to and covers any general officer commanding the Army, any general officer commanding a separate army, or any general officer commanding a separate department. So that the obvious meaning of this statute is that the court-martial is to be convened by a commander under whom the accused party is serving, in every case, except where such commander is the accuser." And where such commander is accuser the Statute authorizes the President to convene the court.

Now the authority for the President to appoint a Court-martial in a case where the commanding general of the accused *is not* the accuser is not to be found in the Statutes. Is it to be found outside of the Statutes? for unless there is some authority for the President to appoint a Court-martial, to be found outside these Statutes, this Runkle Court-martial was illegally convened and its every act is null and void.

Upon this question the Court of Claims held [Transcript of Records Pp. 12.]

"By the Constitution the President is the Commander in Chief of "the armies of the United States. Courts-martial are the creatures "of orders, the power to convene them being an attribute of com-

"mand. As Commander in Chief, the President is authorized to "give orders to his subordinates, and the convening of a court-mar- "tial is simply the giving of an order to certain officers to assemble "as a Court, and, when so assembled, to exercise certain powers "confered upon them by the Articles of War."

Is this statement law?

Command must be and "is application or exercise of authority."

Command must have authority for its basis. Command is either the exercise of authority conferred, given by law, or of power inherent in the commander as in the case of absolute monarchs.

In the United States it is the former.

An order is "a customary mode of procedure," An order issued by the President either carries into effect the provisions of the Constitution and the laws enacted thereunder, or it carries into effect the will of him who commands.

But the will of the President cannot make law by order. The Constitution provides:

"The Congress shall have power * * to make rules for the "government and regulation of the land and naval forces;" and further; "to make *all laws* which shall be necessary and proper "for carrying into execution the foregoing powers, and all other "powers vested by this constitution in the government of the Unit- "ed States, or in any Department or OFFICE THEREOF."

Nothing could be clearer or more emphatic. The President is stripped of any semblance of authority to create courts-martial.

It has been held by Justice Story and Chancelor Kent, that the authority to command the Army and Navy necessarily belongs to the Chief Executive, but nowhere has it ever been held that command has inherent in it such power as set forth by the Court of Claims.

The Court of Claims declares that "the convening of a court- "martial is simply the giving of an order to certain officers to as- "semble as a court; &c."

But it is far more, it involves the selection of the officers composing the court, the fixing of the number of officers constituting the the court, the date and place of meeting, &c., and in a case where the War Department assumes to be the accuser, to appoint the court and to approve the findings and sentence, acting in all for the President, these become important matters.

This idea, or assertion, that a court which may hold in its hands the honor, liberty and life of an American citizen is a mere "crea-

ture of orders" as if it matters not how or by whom it is convened is new to the world and as repulsive to the American idea of law founded on justice as it is new. This doctrine of inherent power in the Presidential office is a monstrous one to emanate from a court. It is well understood and has been affirmed by decisions of our highest tribunals that the governmental structure erected by the Fathers is based upon constitutional law, clearly stated and well defined. Under this structure the Presidential office is possessed only of such powers as the constitution gives. There is nothing implied. There is nothing left in doubt.

We turn then to the Constitution and find in reference to the above quoted assertion of the Court of Claims these words, which I repeat;

"The Congress shall have power * * to make rules for the "government and regulation of the land and naval forces;" and further; "to make *all laws* which shall be necessary and proper for "carrying into execution the foregoing powers, and all other pow- "ers vested by this constitution in the government of the United States, or in any Department or OFFICE THEREOF."

This is final when a power is, by the Constitution, vested in one branch of the Government it cannot be by implication or construction, transferred to another.

Now the President is the creature of the Constitution, and all the powers given him are regulated by the Constitution and the laws of Congress. We cannot go beyond these. There is no implied or constructive power such as grows up through practice about a sovereign under a monarchy where no written Constitution exists. The President is Commander in Chief of the Army and Navy of the United States but he is Commander in Chief by virtue of the Constitution and the laws of Congress. Congress may, as it has in times past, regulate the Army and Navy in any way it may see fit, or the public good demand. It can, by Statute, regulate their organization in every detail, and it may by Statute wipe out both. The Army was created by act of Congress, lives by consent of Congress, and no official has any authority in connection therewith except through an act of Congress.

Yet nothwithstanding this the Court of Claims declares; "courts-martial are the creatures of orders." Not so. They are the creatures of law. The "Rules and Regulations" enacted by Congress prescribe carefully and with great particularity, by whom they shall

be appointed, what number of officers shall constitute, how they shall meet, conduct and record their proceedings, vote and adjourn, and even go so far as to prescribe how a court-martial shall behave, saying: "The members of a court-martial are to behave with decency and calmness" (Old Article 72). Some authorities (or some officials claiming to be authorities) would place courts-martial as to the effect of their judgments on a par with the U. S. Supreme Court. Strained construction here overleaps itself and becomes ridiculous, and instead of the "convening of a court-martial, &c., as the Court of Claims holds, it is the first and a most important step in carrying into effect the law, and every step from end to end must be taken as the law directs, or the proceedings are null and void.

If courts-martial are the "creatures of orders" what is to prevent the President under his powers as Commander in Chief from raising and equipping armies, or fixing the number and pay of enlisted men in the army, or fixing the grade and authority of officers? True the constitution confers the power on Congress, to do these acts as it also confers power "to make rules for the "government and regulation of the land and naval forces," (and Congress has made such rules) but under his authority to command, the President would, it seems, only have to order certain officers to "assemble and proceed," although in so doing he ignores the law. If this be so, why should President Lincoln have waited for an Act of Congress to enable him to call out more than seventy-five thousand volunteers, when the very existence of the Constitution was imperiled? Probably because he was a President who honored the law and did not hold such an exalted views of the power to command.

The law gives to a general officer of the army the right to select and have detailed certain officers to serve on his personal staff. Suppose the President should arrogate to himself the right to select and assign such officers would such act be legal although such officers discharged their duties with ever so careful regard to law, after such appointment?

In the next place, in order to strengthen and fortify this remarkable construction of the Executive's power to command, the court goes on to say:

"This general power has been exercised in repeated instances by "the President since the formation of the government."

That is to say, that because certain Presidents after the Congress plainly defined who might appoint courts-martial designated the duties of the President in the same acts, (that of 1830) did appoint courts-martial, therefore, in 1872, President Grant might assume to be, in fact, the accuser, appoint a court-martial and review its proceedings, the very combination of acts which Congress by the above mentioned laws unquestionably endeavored to prohibit.

In other words, the Court of Claims holds that these illegal acts of certain Presidents make a custom and that such custom is law.

Neither the number of wrongs that make a right nor the number of illegal acts which constitute a legal custom has ever, as yet, been judicially stated.

In fine, neither the Constitution nor any act of Congress confers upon the President any power to assume to do anything which Congress has directed other officials to do.

Doubtless the Court of Claims was of the opinion that the statute of 1806 left the President at liberty to exercise the court-martial appointing power (which no President ever did exercise prior to the passage of the act of 1806) at his pleasure, and that the act simply permits the "General commanding an army or Colonel commanding a separate department" to make such appointment. But what object there could be in such legislation unless to introduce confusion into the administration of military justice it is difficult to conceive—that is if such is the true construction.

Congress, however, does not leave Presidents at liberty to exercise their will and pleasure in matters upon which it is its constitutional duty and privilege to legislate. Even the Continental Congress in the infancy of the country, and in times of trying distress did not leave the convening of Courts-Martial unprovided for but regulated it by acts as early as April 14, 1777 and May 31, 1786. The people of the Republic have not nor ever had, such grand confidence in the unrestrained use of executive authority, nor are they so indifferent concerning the exercise of military power, as the Court of Claims seems to suppose.

The construction which the Courts of Claims places upon these statutes is not a fair construction.

"The plain meaning of the Statutes," to quote the words of an eminent jurist, the Hon. G. W. McCrary in his opinion delivered

to President Hayes," "is that the President shall appoint only in cases "where the commanding general is disqualified. This is in pur- "suance of a wise and human policy. The President resides in "Washington. He cannot be presumed to be familiar with the "merits of charges and accusations against soldiers in the field or "garrison, but the general in command is on the ground familiar "with the facts, and of all men, the best fitted to select the court, "unless in the exceptional cases in which he is the accuser, in "which event the President is authorized to act.

"Suppose a statute should authorize the District Judge to appoint "a jury to assess damages in a given class of cases with a proviso "that in the event of his being interested, a judge of the Supreme "Court should make such appointment, would any lawyer claim "that the Supreme Judge could act in any, save the case specified?

"If, therefore, it were admitted [which it is not] that prior to the "enactment of the Statutes of 1806 and 1830, the President could, "as Commander in Chief of the Army, appoint Courts-Martial, it is "clear that his power was limited and curtailed by those statutes "unless, indeed, it be held that Congress had no power to deter- "mine by whom such Courts are to be appointed."

The Court of Claims shows that by the constitution the President is made Commander in Chief of the Army; but throughout the whole opinion, upon this point, this one fact *alone* is considered. Two other facts are ignored, viz:

(a) That the Constitution confers upon Congress the power to make rules for the government and regulation of the Army, and all that relates to Court-Martial comes under the head of *government* not of *command*.

(b) That Congress by the Acts of 1806 and 1830, exercised that power.

In the next place it is certain that when it has been the intention of Congress that the President should appoint Military Courts it has been clearly stated. Articles 91 and 92 of the Articles of War in force when Major Runkle was tried, provide concerning Courts of Inquiry, that: "Courts of Inquiry to examine into the nature of a transaction or imputation against any officer or soldier may be ordered by the President or by any commanding officer." If Congress considered that the President's power to command carries the authority to convene Courts, why did Congress provide that he may appoint Courts of Inquiry? And if Congress found it necessary to grant the President authority to convene Courts of Inquiry, which are merely preliminary and, compared to Courts-Martial, powerless bodies, how could Congress have considered it unneces-

sary to give him authority to convene Courts-Martial if it was desired or expected that he would exercise such authority? The necessary inference is that when Congress intended to clothe the President with power to appoint Military Courts, it was so stated, and unless it was so stated, no such power exists.

Moreover it may be assumed that we can claim that when Congress passed the Act of 1806, it was the intention to provide for, and dispose of, the whole subject, and that this was finally done by the Act of 1830, for there has been no change in the provisions of the law since that date.

Therefore, it would seem that up to 1830 the President had no legal right. whatever, to appoint Courts-Martial, and after that date only in one specifed class ot cases. See Transcript of Record Page 12.

Then the Court of Claims further supposes that if the President has not the power to appoint Courts-Martial as an attribute of command, "there is danger of a failure of justice in the absence of the "assignment of a general officer to the command of the Army * * "in a considerable class of cases of officers and soldiers not under "the command of any Department Commander as for example a "large proportion of the officers of the general staff, and the whole "body of retired officers."

In the first place, the failure of the military authorities to assign a general officer to command the Army, or commanding officers to Departments is not supposable. Neglect of duty on the part of high officials can hardly be supposed to maintain legal positions, much less legal technicalities adverse to the rights and honor of the Nation's officers.

Again all officers are liable under the laws governing Courts-Martial; Retired officers, notably so, under the decision of the Supreme Court. They are amendable to the courts legally appointed in the Departments where they live. There can be no failure of justice, and if they were, better far a failure of justice than a usurpation of power.

It may not be amiss to note that the case of Major Runkle was not one in which there was any danger of a failure of justice. Winfield Scott Hancock was the Commanding General of the Military Division in which that officer lived, and General Alfred H. Terry commanded the Department in which he was illegally tried.

In regard to the cases of Generals Hull, Gaines and others an examination may show circumstances and surroundings which will account for the action of the Presidents, but whether it does or not, the law must govern and not executive action in these special cases.

But, to repeat the question and go more into detail, has the President power inherent in his office to appoint Courts-Martial or only such power as is granted to him by Acts of Congress?

It was set forth in a foot note appended (by some one unknown to Appellant) to the opinion delivered by Attorney-General Devens, on this case, to President Hayes—which foot note formed no part of the opinion which did not touch the question we are now discussing—that, as to what powers the President has in regard to convening Courts-Martial we are "left to ascertain his (the President's) power in this regard by reference to the law and usage of our military service as it existed when the Constitution was framed." And this view was urged before and adopted by the Court of Claims.

We answer, by reference to law, well and good, but by reference to usage, no, for there was not and could not have been any "usage" for the whole subject was regulated by statute law.

In support of this claim of usage or custom it has been, and may be asserted again that General Washington, as Commander-in-Chief of the Army and as President of the United States exercised authority to appoint Courts-Martial by virtue of his office as Commander-in-Chief.

This statement is not true in fact. General Washington did not exercise such power by virtue merely of being Commander-in-Chief.

General Washington was Commander-in-Chief of the Continental Armies from 1776 to 1783, and President of the United States from 1789 to 1797, and during all this time his power, as far as he had any, to convene Courts-Martial rested upon law, statute law—and was not an "attribute of the power to command."

General Washington was commissioned by the Continental Congress; his commission was an act of Congress—a law. By his commission he was clothed with authority to "do as he should think best for the good of the service," and to cause strict discipline and order to be observed in the army. Thus under the axiom of the law, that every law carries within itself the powers necessary to give it effect, was certainly strong enough and broad enough, and there was left no ground on which usage can rest. To give the Com-

manding General specific power and authority to enforce discipline and then deny him the necessary means would have been absurd

This commission came from Congress, was an act of Congress, and carried with it all the authority Congress could confer.

The following are the closing words of General Washington's commission:

"We do also enjoin and require you to be careful in executing "the great trust reposed in you, by *causing strict discipline and order* "*to be observed in the army*, and the soldiers to be duly exercised and "provided with all convenient necessaries. You are to regulate your "conduct, in every respect, by the rules and discipline of war as here "given you, and properly *to observe and follow such orders and di-* "*rections, from time to time, as you shall receive from this* or *any* "*future Congress of the United Colonies*, or Committee of Congress. "This commission is to continue in force until revoked by this or a "future Congress. JOHN HANCOCK, President."

Note that one of the chief duties with which General Washington is charged, is to be *governed by the laws of Congress*. He is not left to "inherent power," or authority derived from construction or custom.

Herein is contained power, and authority not given by commission to any other military officer of the government. He is to "cause strict discipline to be observed," and this power is distinct from the authority to command. It is specifically conferred upon him by act of Congress and is not inherent in his office as Commander-in-Chief. Though the articles of war were silent, for a brief period, on the subject of convening Courts-Martial the terms of the Commission gave the necessary and only power.

Then, in the words of a learned counsellor: "The Constitution of the United States confers upon the President of the United States, as bearing upon the present question, no prerogative or power other than such as inheres in the office of Commander-in-Chief. Hence unless the power to cause strict discipline and order to be observed *inheres in and is a part of the power to command* General Washington's commission bestowed powers *not* bestowed on the President of the United States in virture of his being Commander-in-Chief.

Therefore we demonstrate that General Washington possessed this power, *not* because he was Commander-in-Chief, but because Congress specifically conferred it upon him in the words of his commission.

What is now said is, we submit with the utmost deference to the court, absolutely irresistable and conclusive upon that great underlying and controlling fact, as applied to this part of the argument, that General Washington never for a moment exercised the power of convening Courts-Martial in virtue of merely being Commander-in-Chief, but that he exercised it in virture of an act of Congress contained in his great commission."

So we see that prior to April 14, 1777, the power to appoint Courts-Martial was vested by act of the Continental Congress in General Washington through his commission, and on that date the Continental Congress provided as follows:

"The Continental General Commander, either of the American "States for the time being, shall have full power of appointing Courts-"Martial to be held."

The articles of war prior to the passage of this act were silent in regard to the appointment of Courts-Martial. They were provided for by the terms of the commission, and here we have the first act of Congress.

Again, so far from leaving this matter to "inherent power" or the will of the Commander-in-Chief, the Continental Congress on the 31st of March, May, 1786, adopted a resolution providing:

"General Courts-Martial shall be ordered as often as the case "may require, by the general or officer commanding the troops."

Therefore, may it please the Court, at the date of the adoption of the Constitution of the United States the matter as to the Court-Martial appointing power stood as follows:

(a) The Commander-in-Chief had held, by virtue of his commission—an act of Congress—authority to "cause strict discipline and order to be observed in the army," and so could appoint Courts Martial by virtue of a power granted to him in said commission, and distinct from the power to command.

(b) On the 14th of April, 1777, the power to appoint Courts-Martial was extended and given by Congress to a "general commanding a State," and on the 31st of May, 1786, Congress gave like power to a "general or officer commanding the troops."

It will be observed that the notion that the power to command carries the authority to convene Courts-Martial did not enter into the minds of the Continental Legislators.

Up to the date of adoption of the Constitution, September 17, 1787, Courts-martial were convened, and only convened by virtue

of authority directly granted by Congress, and in words specifically distinct from those conferring power to command. So at that date there was no usage of the service in this regard and none could have existed.

"Prior to the adoption of our Constitution," as says a distin-"guished and able advocate, arguing this question, "in our military "affairs there never was a day nor an hour when a Court-Martial "either could be convened, or in fact, was convened, by virtue of a "mere power to command; but, on the contrary, the power was al-"ways derived from the direct, explicit legislation of Congress. The significance of this fact will appear as I go on.

From this, it plainly results, as a matter of legal reference, that, since the adoption of the Constitution and before, there existed, and had existed, no law or usage which authorized any commander, *merely* in virture of his being commander, to convene Courts-Martial; therefore, when the Constitution, at its adoption, gave the President power to be Commander-in-Chief of the Army, and stopping there without giving him power or prerogative to "cause strict discipline and order to be observed in the army;" when it does that the presumption of law is that it was not intended, nor will it be inferred, that these words "Commander-in-Chief" carried with them the right to exercise a power which had never theretofore inhered in, nor been bestowed by, the mere power to be Commander-in-Chief.

The position that holds that because Washington held, under an act of the Continental Congress, the power to cause strict discipline and order to be observed in the army, "That, therefore, this "statute or enactment (embodied in the commission by the Con-"tinential Congress) is incorporated into the laws of the United States "under the Constitution, is a proposition which seems to us simply "absurd. The result of such a proposition would be to give to every "officer, acting under our present Constitution, in absence of all leg-"islation by the Congress created by the Constitution, all the "*statutory* powers which a similar officer held under the enactments "of the Continental Congress. It would, in other words, be to hold "that all laws in force under the Continental System remained in "force under the new Constitution, and continue to control the action "of the officers of the government thereunder."

This theory of inherent power of the President to appoint Courts-Martial is founded on an idea that the word of Commander-in-Chief

had a fixed and definite legal signification under the Continental Government before the adoption of the Constitution, and carried the same into the Constitution; and that because the President at the time of the adoption of the Constitution held by virtue of law, the power to convene Courts-Martial, it was intended that when a similar officer was created by the Constitution, such officer should have the powers held by said similar official before. There was no such power inherent in the office before as has been shown, and the words Commander-in-Chief never had any such legal signification.

If the words Commander-in-Chief had such legal signification in England—which, as we shall presently show, they never had—they could not have such meaning under our Constitution, for the reason that the Constitution regulates, specifically, the powers of the President and provides carefully and explicitly for the government of the army.

If the words Commander-in-Chief had such known legal meaning, and Courts-Martial were considered the "creatures of orders," why did the Continental Congress insert the words quoted in General Washington's commission, and why did it pass the acts of 1777 and 1786? Wherefore, all this legislation by Congress under the Constitution?

We find nowhere in the Constitution the words of President Washington's commission; no power vested in the President to 'cause strict discipline and order to be observed in the army," nor any similar words, but we do find Art. 1, Sec. 8, "the Congress shall have power * * To make rules for the government and regulation of the land and naval forces. * * To make *all laws* which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department *or officer* thereof."

In these sections there is no loop-hole through which to thrust executive "attributes of command" or "creatures of orders." The power to make laws for carrying into execution constitutional powers is expressly given to Congress, and emphatically *limited* to Congress

If then "the creation and regulation of military courts come within the power to make rules for the government of the army, then clearly the President has no such power except as Congress may confer it upon him.

An American Court-Martial is the creature of statute law. If it has not statute law for its base it has no legal existence. Congress has exercised its power to provide for the convening of Courts-Martial, and even if custom had ever existed it would now have ceased to exist. When Congress, by the acts of 1806 and 1830, exercised its constitutional power it excluded all other methods of creating, organizing or convening Courts-Martial. This upon the well established principle of law; "*expressio unius est exclusio alterius.*"

The provision of the act of May, 1830, that the President shall appoint the court when the commanding officer of the accused is his accuser or prosecutor, is equivalent to prohibiting him from appointing in any other case; otherwise the President might assume to exercise the functions of any other officer of the government. This is especially so in view of the fact that with us, a Court-Martial is a creature of statute having no existance at common law.

Such being the law what are the authorities?

We beg leave, seeing that this question is for the first time directly before the court, to quote the opinion of Attorney-General Crittenden, as showing how a pure, sound and able lawyer regarded this matter. He says: See opinions Attorney-General, page 508:

"By the Constitution of the United States the power to raise and "support armies; to provide and maintain a navy; to make rules for "the government and regulation of the land and naval forces are ex-"pressly vested in Congress.

"It is quite *evident* that, as an *essential* part of this power, it be-"longs exclusively to Congress to ordain or provide for Courts-"Martial; to define their jurisdiction; to make their sentences final "and conclusive or subject to some revisory power; *to designate by "whom they should be convened*, and by whom their sentences should "be revised or confirmed; and generally to make such provision "concerning them as it seems proper.

"The Congress has exercised that power in the enactment of the "law of the 23d of April, 1800, entitled an act for the better govern-"ment of the navy of the United States. [2 Stat. 45.]

"It follows from the exclusive power of Congress over the subject. "that *no one* can have any authority either to *convene a Court-"Martial or to affirm or disffirm its decision, unless it can be shown "that such authority has been delegated by Congress.*"

This is that for which we contend. It belongs *to Congress to to designate by whom Courts-Martial shall be convened; no one can*

have authority to convene a Court-Martial unless it can be shown that such authority was delegated by Congress.

It has not, and it will not be claimed that Congress has delegated to the President power to appoint a Court-Martial in a case such as the one now before the Court.

But there is higher authority for our position that the President had no power to appoint this Court, than the opinion of any lawyer however able and distinguished, and we will state that to which we desire to invite the attention of the Conrt, in the language of the Hon. Samuel Shellabarger, to whom we are greatly indebted for his clear and able presentation of the law on this question.

"Still, again, that the President has power to create, regulate or convene courts-martial can not be asserted, except as such is given by statute, is made equally plain by another most familiar and separate principle of the law. This general principle to which we here allude is stated in a great variety of ways, and may be here stated in the language of the Supreme Court.

Now I come to the Supreme Court of the United States in the Milligan case. The President had, on the 15th of September, 1863, (13 Stats., 734,) under authority of an act of Congress suspending the privileges of the writ of *habeas corpus*, directed the military, naval and civil officers of the United States to hold persons in their custody, either as prisoners of war, spies or aiders of the enemy, &c. Mr. Lincoln had directed such persons to be held in arrest, doing that under the aunthority given by Congress to him in the act which authorized him to suspend the privileges of the writ of *habeas corpus*. Under this direction of the President, Milligan was, by order of Major-General Hovey, on the 5th of October, 1864, arrested and brought before a military "commission" convened at Indianapolis. Now, the difference between that case and this is only in the fact that that was a military commission, whereas this is a Court-Martial. Regarding the power of the President, in matters of this sort, the Supreme Court speaks, page 121. Note how exactly in point this is. The question which the Supreme Court had to deal with was about the power of the President, in virtue of his Presidential prerogatives as Commander-in-Chief, to convene courts —military courts. And it does not make a particle of difference whether it was a military court called a "commission," or a military court called a "court-martial." The principle which the Supreme

Court was dealing with was the general power of the President, his power at large, that is, his power in the absence of express statutory authority. For that is what these gentlemen must insist and rely upon. His power "at large" as Commander-in-Chief. And in dealing with that identical question, what power has the President, independently of statutes, to make courts military, the Supreme Court says:

"Every trial involves the exercise of judicial power; and from "what source did the military commission that tried him derive their "authority? Certainly no part of the judicial power of the country "was conferred upon them; because the Constitution expressly vests "it 'in one Supreme Court and such inferior courts as the Congress "may from time to time ordain and establish,' and it is not pretend-"ed that the commission was a court ordained and established *by* "*Congress*. They can not justify on the mandate of the President, "*because he is controlled by law*, and has his appropriate sphere of "duty, which is to execute, *not to make*, the laws; *and there is no* "*unwritten criminal code to which resort can be had as a resource of* "*jurisdiction*."

In other words, he is controlled in this case by the act of May 29, 1830.

Then on page 139 of the same case, the Court distinguishes between the power of the President to "command" the army and the power to make regulations for carrying on war. It says:

"Congress has the power not only to raise and support and gov-"ern armies but to declare war. It has, therefore, the power *to pro-*"*vide by law for carrying on war*. This power necessarily extends "to *all legislation essential to the prosecution of war with vigor and* "*success*, except such as interferes with the command of the forces "and the conduct of campaigns. The power and duty belongs to "the President as Commander-in-Chief"—that is the power to com-"mand campaigns. Both these powers are derived from the Con-"stitution, but neither is defined by that instrument. Their extent "must be determined by their nature, and by the principles of our "institutions."

"The power to make the necessary laws is in Congress; the power "to execute, in the President. Both powers employ many subordi-"nate and auxiliary powers. Each includes all authorities essential "to its due exercise. But neither can the President, in war more than "peace, intrude upon the proper authority of Congress, nor Congress "upon the proper authority of the President. Both are servants of "the people whose will is expressed in the fundamental law. Congress "cannot direct the conduct of campaigns; nor can the President, or "any commander under him, without the sanction of Congress, *insti-*"*tute tribunals for the trials and punishment of offences*, either of sol-

"diers or civilians, unless in cases of a controlling necessity, which "justifies what it compels, or at least insures acts of indemnity from "the justice of the legislature."

The view which I resist says that he can convene tribunals without the authority of law and in virtue of merely being Commander-in-Chief. The Supreme Court says no; the power to make articles of war belongs to Congress, the power to institute courts and to provide for their convening belongs to Congress; and where Congress has done it, the President cannot do it otherwise than as directed by law of Congress. And when he instituted a commission at Indianapolis to try Milligan, the Supreme Court said that it was no court, and that, if they had proceeded to trial, the execution of the court's sentence it would have been legal murder.

On exactly the same principle here found in Milligan's case, holding that the Congress alone, and not the President, can institute Courts-Martial, is the case of Dynes vs. Hoover, (20 Howard, 81—82), where the Court says:

"Persons, then, belonging to the army or navy, are not subject "to illegal or irresponsible Courts-Martial when the law for *convening them and directly their proceedings for organization and for trial have been disregarded.* In such cases, everything which may "be done is void—not voidable, but void."

"Courts-Martial derive their jurisdiction and *are regulated*, with "us, by an *act of Congress*, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the "punishment which may be inflicted, are expressed in terms."

To the same effect is that laid down in Greenleaf on Evidence (Vol. 3, Sec. 407), where the author says:

"A Court-Martial is a court of limited and special jurisdiction. "It is called into existence by force of express statute law—"

The view which I am resisting says that it is called into existence not by the express statute law, but it is called into existence by the President's acting as mere Commander-in-Chief. But the author says that—

"It is called into existence by force of express statute law for a "special purpose and to perform a particular duty, and when the object of its creation is accomplished it ceases to exist. The law pre-"sumes nothing in its favor."

The application of the doctrines here cited to the question of the power of the President to convene this Court in the absence of express statutory law so authorizing, is obvious and conclusive, and is this: that since such courts have no existence except "as called

into existence by force of express statute law," and since the "*law for convening them and directing their proceedings for organization and for trial* (20 Howard, 31,) must not only be found in the statute, but must be strictly followed as expressed in the statutes creating, *convening* and controlling the proceedings of these courts, therefore it follows, absolutely and conclusively where the statute for convening the court prescribes the conditions under which the court may be convened and designates the officers who may convene them, that, when *convened* contrary to the provisions of such statutes, they are illegal tribunals without jurisdiction, and all proceedings taken by such organizations are, as the court says in the case of Dynes vs. Hoover, "void—not voidable, but void."

In these cases we have, therefore, these principles settled, if they need any settlement—and this is a summary of all I have gone over:

First. That there are no common law offences within the cognizance of the federal courts, military or civil.

Second. That the power to make rules for the government of the army belongs to Congress and not to the President, and that the creation of all military courts, and the methods of their "*convening*" and action come within the power to "make rules" for the government of the army.

Third. That the President has no power of making rules or of creating or convening courts in contravention of rules established by Congress.

This doctrine, for which we contend, is supported by the legislation in respect of the navy. By the Constitution the President is made Commander-in-Chief of the Army and Navy. If the authority to convene Courts-Martial as to the navy inhered in the President by virtue of his being Commander-in-Chief of the Navy, then no legislation was necessary to confer upon him that authority. And yet in respect to the navy, Congress specifically conferred upon him the authority to convene Courts-Martial, and the fact that such authority was not given generally as to the army, but was given to him in special cases, shows that the latter had not escaped the attention of Congress, and that Congress conferred upon him all the authority which it was intended that he should exercise in that regard.

Now, may it please the court, there is but one other subject, and it is important—I mean one other head of this subject, and it is im-

portant—that I wish to allude to. You will find in all these foot notes (for that is about the best we have against our view of the case), that the English practice is relied upon as furnishing some authority for our President to convene Courts-Martial, and it is said that in England the Crown can convene Courts-Martial, and, therefore, our President may do so. That on its face is one of those arguments that would not commend itself very strongly even to the average school boy. Yet such arguments have been made, and here is what we have to say about that.

It has been maintained, by some writers, that the Crown of Great Britain may legally do this thing, that is, convene courts-martial, independently of statutes, and that the President of the United States, therefore, by virtue of his office, in analogy to the Sovereign of England, may also exercise the same power. Could there be a more illogical conclusion, in view of the structure and theories of the two governments? The Crown of England possesses all the sovereignty of the kingdom not granted by charter to its subjects. The Government of the United States is just the opposite. This Nation is peculiarly a Government of law. Its existence is the will of the people expressed in written law. But, for the purposes of this question, they may be considered similar. That is to say, now we go on and assume just exactly what is not true, that the two governments are *alike* in regard to the powers held by the executives of the two. Now, assuming that to be true, still the argument falls to the ground. The Crown of England never legally possessed the power to appoint courts-martial in time of peace independently of the authority of Parliament. In time of peace the common law of England knew no distinction between a citizen and a soldier; so that, if the soldier deserted, he could not be punished as a criminal. If he struck his officer he was only liable to indictment for assault and battery, and it was held that although the king may, by his prerogative, enlist soldiers, even in time of peace, still, if there was no statute so authorizing, they could not be punished for any military offence, and were only amenable to the same laws as the rest of the king's subjects. (Macauley's History of England, Vol, 1, 296; Vol. 2, 274; 100 U. S. R., 21; Lord Campbell's Chief Justices, Vol. 2, page 91; Statute 1, William and Mary, ch. 5, A. D. 1689, known as the first mutiny act.) This last named act (1 William and Mary, ch. 5,) was one which granted authority to the

Crown, for the first time, to "cause courts-martial to be appointed to punish desertion, mutiny or sedition among the troops authorized to be raised for the safety of the kingdom, &c."

The great charter of King John had made the people of England freemen. It protected them from trial, save by those who knew the law of the realm and meant duly to observe it. It was within the prerogative of the Crown to constitute courts of justice to act within the known and prescribed limits of the common law, but the Crown had no power to set up a court for the declared purpose of judging its subJects by other rules. (See Clode's Military Forces of the Crown, Vol. 1, page 56–76; Chitty's Prerogatives, page 75; Creacy on the British Constitution.)

In Pendergast's law relating to officers of the army, an English work of standard authority, at pages 3 and 4, it says:

"But the Mutiny Act is not a mere Parliamentary license to the "Crown to maintain a body of troops, it also enables the Crown to "try offenders against military discipline by courts-martial. The "common law of England knew nothing of courts-martial. It "recognized no distinction in time of peace between a soldier and "any other subject."

Hence the annual mutiny act to this day provides for convening this court.

And this is the only place where the Crown of England or the officers of England get the power to convene courts-martial. It is contained in their annual mutiny acts, and they contain this provision:

"A general court-martial shall be convened by Her Majesty, or "some officer deriving authority to convene a general court-martial, "immediately or mediately from Her Majesty."

Thus they get their authority in the annual acts of Parliament down to this day.

Now, I have cited to you the first act, that of William and Mary, relating to this subject, and the last act relating to it, namely, the annual mutiny act of Parliament.

In the case of Johnston *vs.* Sutton (1 Term Reports, 493), decided in 1876, there was an action on the case by Johnston, who was a captain of a vessel in an English squadron of which Sutton was Commander-in-Chief. In the declaration, amongst other things, Johnston charged Sutton with having wrongfully and maliciously delayed, for an unreasonable time, the convening of a Court-Martial,

as was his duty to do as Commander-in-Chief, within a reasonable time. To this charge in the declaration it was replied that the declaration must show that the Commander-in-Chief *held such power*. Allow me to state the character of this case. It was a case where the captain of British vessel sued his Commander-in-Chief of a squadron because the Commander-in-Chief had put him under arrest for disobedience to an order, and then had not convened a Court-Martial for two years, and had kept him, all this time, lingering in jail. And he brought an action of trespass, saying, "Mr. Commander-in-Chief, it was your duty to convene a Court-Martial for my trial, and not to have kept me these two years in this way." And that was one of the grounds for recovery. Now, you see, that brought up the question directly. Had that officer, *in virtue of being Commander-in-Chief, the power to convene a Court-Martial?* Because if he did not have power to convene one, except where the *statute* provided that he could convene, and if he had convened one as soon as the *statute* would let him, he having no power outside of the statute, then he was not guilty—then he could not be recovered against, and the Court was thus brought directly to the question whether a Commander-in-Chief in England, in virtue of mere command, and outside of statutes, could convene Courts-Martial. That is the question we deal with here, if we are to be assimilated to England. Without reading the case through, I state that the Court came to this question; and Lords Loughborough and Mansfield held that there was no power in England, in virtue of being such a Commander-in-Chief, to convene Courts-Martial; and that as this officer had convened the Court as quickly as he he could, in virtue of the statute he was not guilty.

In the opinion in this case from Lords Mansfield and Loughborough, in passing upon this objection thus stated, the judges say:

"Objections have been made to the plaintiff's recovering upon "this third count because, first, that it doth not appear upon the "declaration, that he (the Commander-in-Chief) *had authority* to hold a Court-Martial."

That was the objection. The declaration did not show it, and they had not shown it by the laws. Now the judges, when they came to sustain this objection, said:

"As to the first, the argument is that, *by law, it was incident to "the duty of his office to hold a Court-Martial.* Now the *contrary* is

"manifest from the statute law of the land. There is no fact to be "tried by the jury. The allegation is a proposition of law, and "stands upon the record. *It is false*, and therefore the basis of the "charge, that the defendant had authority, is wanting, and this "objection we think fatal."

They say, in regard to the allegation, that the power to convene such Court is an incident of command. "It is false." Now, that is English enough, Saxon enough, and plain enough. "It is false, and therefore the basis of the charge, that the defendant had authority, is wanting, and this objection we think fatal." There it is.

Now, if we are to be tried by the laws of England, let us have the laws of England. By the laws of England there never has inhered, as a part of the power to be a Commander, the power to convene Courts-Martial. And we have got to go a whole bow shot in the direction of making our Government more arbitrary, and in clothing it with powers and prerogatives, altogether in excess of those adhering to the Crown of England, in order to make it true that any President of the United States can convene Courts-Martial except as he is authorized to do so by statute law.

The following are Mr. Shellaberger's closing words on this subject, and we respectfully commend them to the attention of the Court. He is speaking of this very case now before your honor, in connection with the case of Brig. General Swaim:

"That case will soon be decided, gentlemen, and then we will *know* this law. In making this appeal to you, I am making it in the direction in which, as I have already remarked, the sympathies of the whole mighty American people run, namely, in the direction of protecting against unauthorized trials, seizures, imprisonments and convictions, all American citizens. When I speak for my distinguished client, I am speaking for myself and my children, and for you and your children. When I say that if there is to be error it ought to be on the side and in the direction of *restraining* these prerogative powers of the officers of the United States—ought to be in the direction of not letting these powers rest in fog, smoke and mist, which nobody can define, know or limit, I think I speak the universal sentiment of the country. Who can tell what powers do not inhere in the power to be Commander in-Chief of the Army, if it be true, as said here, that the President, in virtue of being Commander-in-Chief, can make courts that are unknown to the laws of this country, that are not named in the statutes—can convene them,

then can arrest you or me and send us before that court, unknown to the laws of the land or not convened in accordance with those laws; and above all, and especially, can do this, not in a case where there is an *absence* of statutes upon the subject, but can, in virtue of merely being Commander-in-Chief, exercise this power where there *is a statute defining when and in what case, and in what case alone, he can convene the court?* The statute has not left this thing in fog. It has said all that was necessary to be said about it in order to make plain that the President has not this power. The statute, as it now rests, is the resultant—the combination of all prior laws, and made after all. It is the collected wisdom of one hundred years. It began in 1777, under the old Continental Government, was repeated in 1786, then in 1806, then in 1830, and then again in 1874, where is combined and brought together in one statute all that the legislation the Congress of the United States has thought it wise to have upon that subject. And yet, sirs, in the face of that statute and against it, you are invited to hold that there still rests in the President, outside of this statute and against its face, a power to make a court, to convene a court in a case forbidden by that statute, and only in virtue of this *general* power to command.

Now, gentlemen, I have finished. My work, so far as the opening of this argument is concerned, is done, and the responsibilities are with you. I never have been called upon to argue, and you, gentlemen, will never be called to decide, a question of more supreme moment to the interests of the army than this question—a question of more supreme moment as affecting vital Constitutional principles and the liberty of the people.

SECONDLY:—On the question of the jurisdiction of the Court-Martial—

The Appellant contended before the Court of Claims that the Court-Martial had no jurisdiction over either.

(a) The subject matter of the charges, or

(b) The person of the Appellant.

In holding to the contrary we submit that the Court of Claims erred.

The Appellant set up, in regard to the subject matter of the charges, that the Constitution limits the jurisdiction of Courts-Martial to cases arising in the land and naval forces, and that this case had its origin in connection with duties performed in the

Bureau of Refugees, Freedmen and Abandoned Lands, which was in no sense a military organization.

That the services rendered by Appellant were not military in their nature.

But purely civil.

That the offences were not committed, if at all, while Appellant was doing military duty.

On this point the Court of Claims set forth the provisions of the Constitution that: "No person shall be held to answer for a capital, "or other infamous crime, unless on a presentment or indictment of "a grand jury, except in cases arising in the land or naval forces, or "in the militia when in actual service in time of war or public "danger," and declares that this is no limitation upon the jurisdiction of Courts-Martial, but, on the contrary, "is, in effect, an ex- "press constitutional affirmation and preservation of the unlimited "right of administration of military justice through military "tribunals."

These are strong words, and, if the construction put upon the power of Courts-Martial under this section should be confirmed by the Supreme judicial authority of the land, it may lead to grave results.

But is the "administration of military justice unlimited?" If so why these words, "in *cases arising* IN THE LAND AND NAVAL FORCES?"

And right here it is well for us to determine what is a Court-Martial. It is a body of gentlemen called together as a tribunal to try offenses, without a bar made up of men learned in the profession of law to make a contention over a recognized issue, without a judge to administer the law, and without a jury to determine the facts. These gentlemen by virtue of their commissions and the order on which they are convened find a verdict in accordance with their own convictions or more "generally," as the late Chief Justice Chase once said, "in response to the wishes of their superior officer."

The only difference between a lynch court and a military tribunal is that the one is legalized violence and the other is not. Both are the creatures of necessity, but the Court-Martial only has the sanction of custom and the approval of statutory law.

The Court-Martial has its being in the necessity of preserving discipline in an armed force, and beyond this no reason can be found for its existence.

War is regarded as the antagonism of law and order. It is more. It is the annihilation, for the time being, of law and order. When there is an appeal to brute force for the purpose of settling an issue, there is an abandonment of the rights which civil goverments were organized to maintain, and in this abandonment we throw over all the processes deemed necessary to make those rights secure. An eminent European statesman said, "War is disorganized diplomacy." An American statesman said, "War legislates," and legislates upon the point of the bayonet.

These are facts, and a little thought fetches to the front the reasons for them, that cannot be denied. War being violence, all that grows out of that condition partakes of the nature of its origin. Courts-Martial are of this sort. They were called into existence not as civil courts were to protect the citizen in his rights, but to preserve the discipline of an army. When a man becomes a soldier in time of war, he abandons all the rights of a citizen to protect which civil governments are organized. He not only tenders his liberty and life to his country, but he puts that life and liberty at the will of his superior officer, who may sacrifice both to what he considers the good of the service. In a word, it is a process through which a mass of men abandoning their individuality are moulded into a machine, that is subject to the rule of one. This is called discipline, and to maintain this the same abitrary despotic process known to command is extended to Courts-Martial. It may be unjust in its result but it must be prompt and decisive in its action.

The members of a Court-Martial then, in time of war, must avoid the law's delays so necessary to adjudication in civil courts, and, looking alone to a preservation of discipline, that makes drill and mobility possible are more efficient in their duty when ignorant of all that civilized governments and a free people have so painfully constructed through generations for the better protection of the citizen in his civil rights.

How monstrous then is the claim that these tribunals have concurrent jurisdiction with courts at civil law. The two are not only separate and apart, but in deadly antagonism. This can be tested readily and at once by supposing an attempt were made to establish Courts-Martial among citizens in civil life, and to give them the rights to try offenses known to the criminal calendar. The cry of "Lynch Court" would go up and the new tribunals would be

swept aside by popular wrath as not only menacing our rights but as actually destroying them.

In thus giving to Courts-Martial all the exigencies of the service demand in time of war and more than their advocates claim, I give the reason, not to be denied, why it is impossible for such courts to have concurrent jurisdiction with civil tribunals. This is so well recognized by the greatest war power of Europe, England, that these courts are unknown to common law, were for a long time prohibited during peace, and only exist through statutory law re-enacted every year. Is it possible that we who set so much store by our civil rights, and are so jealous of their maintenance should be less careful of them than a monarchy?

Now, it may be claimed that in the exigencies of the service, in time of war, where civil tribunals are not available, that an officer guilty of theft, for example, may be put to trial before a Court-Martial and punished, but it is monstrous to assert that in a time of profound peace, where no such exigency exists and Civil Courts are available such a tribunal can be tolerated for a moment. It is claimed, however, that this is allowed by statute of Congress. It can not be so allowed. It is in direct violation of the guarantees of our Constitution, and in deadly antagonism to the spirit and form of our free institutions.

To test this, let us suppose that Congress, in its wisdom, taking into consideration the difficulty of having conveniently upon the frontiers Civil Courts to try offenders, were to enact a law authorizing Lynch Courts to arrest, convict and punish criminals. The wrath of the citizens, the sense of justice in your high and honorable body would, at once, pronounce such an enactment not a violation merely of our rights, but an unparallelled attempt to degrade and destroy the law. Yet what is the difference between the two? We can find none in the fact that such usurpation is founded in the sanctity of custom in vogue in armies, and the sanction of statute law.

It is necessary to bear in mind, while appealing to precedents found in the decisions of Courts abroad, the radical difference that exists between our government and those of Europe. Those of the last were born of the military, their first government. All the rights granted the citizen were wrung from the military, that reluctlantly yielded little by little to the demands of the people. With us, on

the contrary, government had its origin from a civil source, is a political structure designed solely to secure the citizen in his rights, and the military is as reluctantly recognized as the rights of the citizen are under the war powers of Europe. There is an inborn instinct in the American nature against a standing army, and certainly no privileges will be granted it that may jeopardize the rights of the citizen.

The Act of Congress passed March 3d, 1863, amid the excitement and tumult of actual war, under which these extraordinary courts claim concurrent jurisdiction, in a case such as the one before the Court, with our civil tribunals is not one which your honors can sanction. Failing to distinguish between the necessities of acutal strife, and the law and order incident to peace Congress placed upon the statute book a violation of the plainest provision of the Constitution. Had Congress followed the precedent established by the British Parliament and made the law depend for existence upon the state of war that made courts-martial a necessity, the enactment might stand, but under that state of fact would not be applicable to this case, for Colonel Runkle was arrested and tried in a time of profound peace, amid civil tribunals where all his rights as a citizen would have been protected, and where the laws of evidence would not have been persistently ignored and wilfully violated.

Those who claim that this law is constitutional, refer strangely to like courts authorized by law for the navy. The ground for approval of such marine tribunals is an unanswerable argument against such courts on land. The exigencies of the marine service make such courts a necessity. A man-of-war upon the high seas is not only removed from all civil tribunals, but it is a little world in itself, where the safety of the vessel depends on a despotic power in the officers that would not be tolerated, even among the military, on shore. Were a General in the army to hang three subordinate officers, as Captain McKenzie executed three midshipmen, that General would, undoubtedly, be indicted, tried and hung for murder, and yet your honorable Court held that Captain McKenzie possessed the power he so cruelly exercised, and could not be held answerable to the laws of the land.

But, says the Court of Claims: "The great and fundamental "proposition of that amendment is that no person shall be held to "answer for a capital or otherwise infamous crime unless on a pre-"sentment or indictment of a grand jury."

Very good! It would seem so.

Here the court remembers that there is a constitutional provision regarding "rules for the government of the land and naval forces," and admits that Congress may prescribe such rules, but says nothing under this head of the undoubted fact that Congress has power under this constitutional provision to provide against the "great confusion and serious obstruction of "justice," of which the court seems to stand so greatly in dread.

The court then proceeds to represent the founders of the Constitution, who were so strenuous to preserve the right of trial by jury, who were so careful to place the military in strict subordination to the civil power,—providing that Congress should make the laws to govern the land and naval forces—as giving the military courts jurisdiction over all, who by any construction, however stained, can be brought before them. Such is the spirit and intent of the remarks of the court, but such was not the spirit that moved, nor the intention that governed the framers of the Constitution.

Doubtless it was the intention to give military courts the right to hold and try such offenders as should be plainly, clearly and without question liable to be so held and tried. But it certainly was not intended that the power given to the military authority should be extended by any broad and liberal construction.

The Sections granting such powers should be, as they were intended to be, strictly construed.

This clause of the Fifth Amendment could never have been intended to give grounds for a court to make, by construction, acts which are civil in their nature, military in their nature; to take from the jurisdiction of the civil courts offenses which are in themselves in no sense military offenses committed, if at all, not in time of war, but in time of peace, and by a person not acting in any connection with the army, but in a civil bureau. It was not the desire of the fathers of the Constitution so to magnify, broaden and extend the military power. They gave to Congress no authority to make "rules for the government of the army" to such end. Nor has Congress made any such rules, and such jurisdiction can only be secured for a court-martial by construction and how this may be done the Court of Claims goes on to show.

The Court of Claims proceeds to enquire whether or not the claimant's contention, "that the offense for which he could be law-"fully tried before a court-martial must have been *military in its*

"*nature*, and that his employment, in time of peace, upon purely "civil duties in connection with the Bureau, though under military "orders, did not subject him to the jurisdiction of a court-martial" is sound.

The above is quoted because it is the Court's way of stating the case. The Appellant does not admit that he was "under military orders." He was assigned to duty by a military order, but under the civil law. He paid bounties for the Treasury Department under the civil law and was responsible to the Treasury Department under the civil law.

The Court quotes from the Act of March 3, 1865; "*Act* to establish a *bureau for the relief of Freedmen and Refugees*," (13 Stat. L. 507, ch. 90), these words:

"Any military officer may be detailed and assigned to duty under this act without increase of pay or allowances," instead of from some constitutional provision or Act of Congress making military the civil duties performed. This for obvious reasons.

But why did Congress insert this provision? Because there were, at the date of the passage of the act in the military service, a large number of volunteer officers, who, having been lawyers, teachers and business men, were eminently qualified to discharge the civil duties required under this act, and not for the purpose of, either directly or indirectly, giving military courts jurisdiction of offenses against the civil provisions of the act. If Congress had desired to make such civil offenses military, and to give courts-martial jurisdiction over them, it had the physical, if not the constitutional, power to do so.

If Congress should see fit to authorize the detail of Army Chaplains as Professors in Theological Seminaries, would courts-martial undertake to try them for teaching heresy? Doubtless they might, under such rulings as the one under consideration, and they would do equally as well as was done in the case in question.

But the Court of Claims proceeds to argue that, because the act does not distinguish between civil and military duties; because the claimant obeyed the order to report for duty; remained on duty until formally relieved, "submitted to a trial on charges alleging "offenses committed while on that duty without, so far as is shown, once urging for his defense, that his duty in the Bureau was civil and not military," therefore he can not set up such defense now, and if he could, the court would answer that whatever service he

rendered was, in the eye of the law, military service, and the court announces that: it is the "military character" of the officer, acting under lawful military orders, which makes "the duty a military "one."

It would seem, therefore, that if Congress desired to make the whole Government military, it would only have to authorize the assignment of military officers to duty in the Civil Departments, have them detailed and hold them responsible before military tribunals, and the work would be done. However, they would probably speedily hear from the conservative branch of the Government.

But to give particular attention to the statements made by the court, enumerated above, concerning Major Runkle's acts in the Freedmen's Bureau, and his omission to plead before the Court-Martial:

It is said that he obeyed the order to report for duty, and remained on duty until formally relieved. True, and considering the power assumed by the military authorities and the extent given by the Court of Claims to the jurisdiction of Courts-Martial, it would have been, to say the least, injudicious for Major Runkle to have done otherwise, even after December 15, 1870, when he was retired.

It is further stated that the Appellant "submitted to trial on "charges alleging offenses committed while on that duty, without "once urging that his duty in the Bureau was civil and not military."

But be it noted that the Appellant pleaded to the jurisdiction of the court generally, and that covers the whole ground, and notwithstanding the "urging" of his counsel, the court overruled the plea. And if he had not so pleaded, the jurisdiction of the Court-Martial may be collaterally attacked, and now: "If the Court-Martial may "beyond its jurisdiction, judgment and sentence, even if approved "by the President, was null and void."

Wise vs. Withers, 3 Cranch, 331.

Dynes vs. Hoover, 20 How., 82.

Wilcox vs. Jackson, 13 Pet., 316, 511.

Barret vs. Hopkins, 2 McCrary, 129.

Then it is further submitted that Major Rnnkle asked for time to prepare his defense. *It was denied him, and that upon the order of the Secretary of War*, and when, at last, after earnest and repeated demands at the War Department, he was granted thirty days, he was kept in arrest at the city of Louisville, until all the time, save five days had expired. This was a violation of statute law and an

error, for the Act of March 3, 1863, (C, 201, s. 7, v. 12, p. 598) provides that a Court-Martial shall, for reasonable cause, grant a continuance to either party for such time, and as often as may appear to be just. This was a matter within the discretion of the court, and the War Department had no authority to interfere and usurp the right to control the court as it did. And it will be noted, we trust, that, as shown by the Record of the Court-Martial, the Court was willing to grant some time but was arbitrarily ordered to proceed at once by the Secretary of War. See page — of this brief for copy of said order.

Let it be further noted that the Appellant asked for permission to examine the records of his own office, covering thousands of payments in order to ascertain, if possible, who of his subordinates paid the negro claimants he was charged with defrauding. *He was refused such permission.*

The Appellant respectfully submits that, considering the limited time and opportunity granted him, he "urged" all that could be expected, and *he was granted nothing*. The sailor captured by pirates and swung from the yard-arm, may urge a few points, but he cannot lay down the whole moral law, or draw nice distinctions. He can only say this is murder, and his failure to particularize does not make the hanging legally or morally right. These may seem harsh words, but a careful reading of the Record, with the letters and orders issued by the War Department in connection with the trial, will show that they are just, for the trial was a most remarkable one, and was conducted in a manner unheard of before.

For a full statement of the unjust and illegal action of the War Department in connection with this trial, (which statement is taken, as far as official documents are concerned from the Record of the Court-Martial,) the court is respectfully invited to read from page to page of this argument.

We wish in this connection to say further the laws of evidence which are sacred in the eyes of the highest courts in the world, as your honors well know, are regarded by Courts-Martial as ingenious devices to defeat the ends for which such courts are established. They accordingly resent the legal objections of counsel as insulting to the intelligence and honor of the court, and overrule them, especially when coming from the defense without knowledge and without mercy. These rules, the product of the experience of ages,

the result of careful study, a monument of studious care, without the application and enforcement of which no trial can be fairly and justly conducted, are regarded by Courts-Martial as not only unnecessary and impertinent but as blocking the way to the prompt administration of military justice. There can be found no better example of this spirit carried into practice than the conduct of the Court-Martial in this case. The record shows that objection after objection was made by the able counsel of Major Runkle to improper questions asked by the Judge Advocate and that these in nearly every instance, and in defiance of the plain rules of evidence were promptly overruled.

Finally this injustice and flagrant violation of law culminated when Major Runkle offered to prove that the prosecuting witness, S. S. Wager, upon whose evidence the 14th specification of the 2nd charge (by which the Court of Claims lays so much store) rested, was a man of bad character; that he had been bribed, his evidence bought by the prosecutor who signed the charges, and letters in his own hand writing were offered to substantiate the charges against him. The evidence was ruled out, and the letters rejected.

Of this proceeding on the part of the Court-Martial the Secretary of War, undertaking to review the proceedings of the Court, said that the Court erred, "*in rejecting a certain letter written by a wit-*"*ness for the prosecution, and offered to impeach his credibility;*
"*also in unduly restricting the cross-examination of the same wit-*"*ness in relation to the motives influencing his testimony.*"

Such high-handed violations of law were too much even for Wm. W. Belknap.

The ground taken by the Court of Claims on this point is not sound.

The duties of the Appellant were clerical and financial. He had nothing to do with the army or the military authorities in their military capacity. His work lay with the Freedmen's Schools, with Church Aid Societies, and with the payment of back pay and bounties, which came directly from the Treasury, and did not pass through the hands of any military official acting in a military capacity.

These duties consisted in brief in—:

1st. A. The charge of educational and sanitary interests of the freedmen, which included the finding, examination of, and paying all the teachers, numbering hundreds.

B. The building of a large number of school houses, and the renting of a much larger number, at one time there being between 38,000 and 40,000 colored children at school in the State under Major Runkle's charge, and this involved the necessity of visiting nearly every county in the State, some quite a number of times.

C. The care of hospitals and asylums.

2nd. The enforcement of the Civil Rights Bill and other enactments of Congress in relation to the freedmen.

3rd. The making out and forwarding the claims of freedmen for pension, back pay and bounty.

4th. The payment of all bounty and back pay.

These, may it please the Court were duties, the nature of which the ordinary military officer was peculiarly unfitted to understand, and neglect of which none but a civil court was at all fitted to sit upon and try.

"The right of trial by jury is preserved to every one accused of "crime who is not *attached to* the army, or navy, or militia in active "service." Major Runkle was while serving in the Freedmen's Bureau *detached from* the army.

"Every one *connected with* these branches of the public service is "amenable to the jurisdiction which Congress has created for their "government, and *while thus serving* surrenders his right to be tried by the civil courts." (Ex-parte Milligan H. Wall, 122-3.)

That is to say, the party must be *in* the army, *attached* to it, and must commit the offense *while thus serving*.

The Hon. Court of Claims begs the question when it asserts that the offenses charged against Ben. P. Runkle come under the provision of the Constitution, giving Courts-Martial jurisdiction over cases "*arising in the land and naval forces.*" This is precisely the contention on one of the gravest issues of this case. Major Runkle was actually in the employ of the Treasury Department in the execution of duties purely civil in their nature, and which did not arise and could not have arisen in the land and naval forces. The clause in the Constitution covers only cases arising in the performance of military or naval duty. The court held that because Ben. P. Runkle was an officer on the Retired List and an agent of the Bureau of Refugees Freedmen and Abandoned Lands, he was subject to trial under the provision referred to. This position is not tenable for the duties, as we have saw, were civil and for their discharge Major Runkle was responsible to the Treasury Department,

and in proof of this, the case has its sole standing in court on the action of the Treasury Department refusing to pay Colonel Runkle, and appealing to the Court of Claims for adjudication.

A citizen, a teamster or civilian clerk who is connected with the army in time of war, is liable to be tried by Court-Martial, not because of his character as a military man, for he is not a military man, but by reason of the character of his duties, and because of the necessity for the preservation of discipline in an armed force. Here the character of the duty, not that of the person governs.

On the other hand, when an officer is *detached from* the army, is performing civil duties separate and apart from the army, duties that cannot by any physical possibility originate in the land or naval forces, his liability to trial must be governed by the character of his duty, and not by his character as an officer.

It may also be remarked that the Record does not show, there is no evidence to show, and, and in fact, there never was any military order, lawful or otherwise, directing the Appellant (Major Runkle) to disburse Freedmen's bounties.

And now, in the next place, let us examine the claim of jurisdiction for the Court-Martial to try Major Runkle, for offenses alleged to have been committed while on duty, without warrant of law, and contrary to the express provisions of the law, after he was retired from active service.

We hold that:

I. Major Runkle could not be lawfully tried for offenses alleged to have been committed in the discharge of public duties after the date of his retirement from active service, December 15, 1870.

II. The fact that three of the fourteen specifications upon which he was tried were dated prior to his retirement, will not avail to save the jurisdiction of the Court-Martial, because

(a) There was no convictions under any of these specifications.

(b) Conviction was impossible, and

(c) The conduct of the Court-Martial under the 14th Specification, 2d Charge, was disapproved by the authority assuming to review the proceedings, and the findings of the Court upon that specification were stricken out.

Then to consider the first proposition; the Act of Congress passed January 21, 1870, (16 Stat. 62 ch. 9 Rev. Stat. 1259,) provides that "Retired Officers of the Army may be assigned to duty at the "Soldiers' Home * * and a retired officer shall not be assign- "able to any other duty—and that all such assignments heretofore "made shall terminate within thirty days from the passage of this "act."

All duty done by Major Runkle after December 15, 1870, was done in violation of law, for which the War Department was responsible.

Now, admitted that a retired officer is liable to trial by Court-Martial for a military offense, i. e., an offense committed by him when acting as a part of the army, or in his military capacity, why is he thus liable? Because Congress has provided that; "They (re- "tired officers) shall be borne on the Army Register and shall be "subject to the Rules and Articles of War and to trial by general "court-martial for any breach thereof," and for no other reason.

When, then, can a retired officer commit a breach of the Rules and Articles of War? When he is on duty, and at no other time, save possibly under the 61st Article, "conduct unbecoming an offi- "cer, &c." How, then, was it possible for a retired officer to be on duty even before the passage of the Act of January 21, 1870? By orders duly issued and by such orders only? Why? Because Congress has provided that; "Officers retired from active service shall be *withdrawn from command*, and from the line of promotion. (Rev. Stat., Sec. 1255.)

Therefore, the retaining of Major Runkle on duty after he was retired, without issuing an order assigning him to duty as a retired officer, was, even before the passage of the Act of January 21, 1870, a violation of the law for which the military authorities were alone responsible.

Yet, directly in the face of all this, the Court proceeds to draw a distinction, and to justify the conduct of the War Department in retaining the Appellant on duty. The law says plainly, "all such "assignments shall terminate within thirty days from the passage "of this act." "*All such assignments*," says the law, but (seemingly determined to find some way to hold valid the unjust action of the Court-Martial) the Court of Claims declares that the Appellant was assigned to duty while an active officer and before the passage of the Act of January 21, 1870, and because no new assignment was

made when he was retired, this act did not touch the case, and his retention on duty was legal and justifiable. But, let it be noted, if Major Runkle was not re-assigned to duty as a retired officer after his retirement, he could not have been on duty except in violation of law, even under the old statutes, and if such assignment had been made it would have been illegal, null and void under the Act of January 21, 1870.

The court says in commenting on this fine point, "The officer was simply allowed to remain on duty." If he was, the same was in violation of the Acts of 3rd August, 1861, and 17th July, 1862. (Rev. Stat. 1875, Sec. 1255.)

Moreover, it would have been kindly in the court to have pointed out how he was to get off this duty without the order of the military authorities who put him on such duty. A legion of ex-soldiers, knocked at the doors of Congress, and begged for a special act to relieve them from the charge of desertion, held over them by the War Department because they ran away home after the war was over without waiting for their discharge papers. Congress passed the act and relieved them finally.

It is not safe in the American army to *assume* that things have been done.

No, it was the duty of the War Department to relieve Major Runkle, in obedience to the law. Folios of argument, such as was advanced by the Court of Claims, will not change this legal fact. And as long as he was not relieved, he cannot be held responsible for the alleged offenses.

We will now consider the second proposition under this head.

On page six (6) Transcript of Record, are found these words: "Of the 1st and 5th Specifications under Charge I, and of the 14th "under Charge II, he was found guilty." *This statement is not correct.* He was not found guilty as charged in these Specifications as the Record clearly shows.

Let us see. The court next proceeds to consider another view of the case which in its "judgment settles the question."

The court says: "The objection is founded on the assumed fact "that the offenses charged against the Appellant, and of which he "was convicted, were committed *after he was retired*, and that, "therefore, the court had no jurisdiction," and the court assumes to correct the facts set forth by the Appellant, and states that "under charge I there were two specifications, (the 1st and 5th) and

"under charge II there was one, (the 14th) each averring act done "by him in 1870, before he was retired; and of those three specifi- "cations he was found guilty, as he was of both charges. This was "enough to uphold the sentence of the court, for those specifications "related to a time when there was not the least ground for disput- "ing the right of the court to try him under those charges."

It will be noticed here that at this point the Court of Claims virtually surrenders the ground that the Appellant could be held on the specifications that originated after he was retired, and rests the claim for the jurisdiction of the Court-Martial in the three remaining cases.

It now proposed to show that:

There was no conviction under these specifications:

That:

Any conviction was impossible, and that:

The finding of the court under the 14th Specification, charge II was, in effect, stricken out by the authority undertaking to review and approve the proceedings.

That the error so admitted and apparent on face of the proceedings vitiates all, and renders the trial no trial, and void.

Was there then any conviction under these specifications?

The first charge upon which the Appellant was tried was;

Violation of the Act of Congress approved March 2, 1863, chap. 67, 1.

The Statute provides in substance as follows:

"Any person in the military service of the United States, who "having charge, possession, custody, or control of any money, or "other property of the United States, furnished or intended for the "military service thereof, knowingly delivers, or causes to be deliv- "ered to any person having authority to receive the same, any "amount thereof less than that for which he receives a certifi- "cate or receipt, or who steals or embezzles and wilfully misappro- "priates and applies to his own use or benefit * * any money "or other property of the United States, furnished or intended for "the military service thereof, shall be punished, &c."

[U. S. Statutes, sec.]

The crimes provided against this section are:

Delivering less than the full amount due, or causing some other person to deliver less than the full amount due, and;

Misappropriating or applying to the offenders own use the money or other property entrusted to him.

The first specification under the charge quoted and relied upon by the Court of Claims, is as follows:

Specification 1st.—"In this, that *Benjamin P. Runkle*, major, "United States Army, retired, being on duty as a disbursing officer "of the Bureau of Refugees, Freedmen and Abandoned Lands, "and charged as such with the payment of claims of colored soldiers, "or their heirs, for money due them for military services from the "United States; and being as such disbursing officer duly directed "to pay, and furnished with sufficient public funds for paying the "claims amounting to three hundred and eighteen dollars and "eighty-one cents ($318.81), of one Louisa McKinney, widow and "legal heir of Wyatt McKinney, late a private of Company B of the "124th Regiment of the United States Colored Troops, did fail and "neglect to pay the same in full to said Louisa McKinney, but did "pay her thereof only the sum of one hundred and fifty-six dollars "and seventy-five cents ($156.75), and did knowingly and wilfully "misappropriate and apply to his own use and benefit the balance "of the said amount, namely, the sum of one hundred and sixty-"two dollars and six cents ($162.06), money of the United States "as aforesaid. This at or near Danville, Kentucky, on or about "October 24, 1870."

The finding of the Court-Martial on this specification was as follows:

Of the 1st *Specification*, "Guilty, except so much thereof as is embraced in the following words, viz: 'and did knowingly and wil fully misappropriate and apply to his own use and benefit the said amount, namely, the sum of one hundred and sixty-two dollars and six cents ($162.06), money of the United States as aforesaid,' and of the part so excepted. *Not Guilty.*" It will be observed here that there was no charge of conspiracy to defraud, nor is there a line of evidence in the record to substantiate such a charge. The specification amounts to a charge of failure and neglect to pay, and embezzlement of one hundred and sixty-two dollars and six cents, *as one charge*. The statute does not aim to provide against mere failure and neglect. Such an offense comes under Article of War. Of misappropriation and embezzlement the court acquitted Major Runkle.

That the court did not consider the finding under the 1st specification, 1st charge, as supporting said charge, but relied on other specifications to support the charge is evident from the finding on the 1st specifications, 2nd charge; which is in effect, identical with the 1st specification, 1st charge; for of this specification the court

found him NOT GUILTY. Whereas, if the court had believed that the finding under specification 1st, charge 1st, had any weight they could not have so found him guiltless.

Let us next consider the evidence upon which these findings were based. It will show conclusively that the court could not have relied on this 1st specfication as supporting any offense provided against by the Act of March 2, 1863.

It was as follows:

(LOUISA McKINNEY'S CASE.)

EVIDENCE FOR PROSECUTION.

Louisa McKinney, (Claimant,) p. 190.

Never made claim for her husband's (Wyatt McKinney) back pay and bounty. There is money coming to me from the Government—it is $300. I got part of it—I got $156.75 in September, 1870, at Danville, from Mr. Runkle, and this is all. I loaned it to Master Nath. McKinney, and he has $80 of it yet. When I got this money I put it all, except $7.00 in bank, gave it to Mr. McRoberts or Mr. Dunn; don't know McLane or Stanwood.

Cross-ex. (p. 195.) Never saw accused before. He is not the man who paid me the money—I am sure of it.

L. P. Yates, (p. 122.)

Knows Louisa McKinney. The Auditor had written her that she was entitled to over $300. H. B. Stanwood wanted to pay her about half, but under his advice she refused to accept it—this in Mary or June, 1870.

Cross-ex. (p. 125.)

Ques. "State whether the accused himself was present at any time during these transactions?"

Ans. "No, sir."

John J. McRoberts, (p. 196.)

On 23d October, 1870, she deposited with me $150, and she had some more—about $5; she had the money tied up in a handkerchief—all new bills.

James Welsh, (p. 198.)

Went with Louisa McKinney to get money from the Government—was up with her when she was paid, and then went with her to the bank; she had the money in a handkerchief, and did not open it until she got to the bank, when she gave it to Mr. Dunn.

Cross-ex. (p. 200.) Did not see the money paid, the crowd was so great. She was paid in Danville, and went to Stanford to put money in bank—went in a spring wagon—it took about two hours.

Court adjourned.

EVIDENCE FOR DEFENCE.

H. B. Stanwood, Bureau Agent, (p. 368.)

I signed the name, "H. B. Stanwood," on the paper you hand me; J. T. E. McLane signed his name; Louisa McKinney made her mark on the same paper in my presence and McLane's. It was made at Danville, Ky., about 23d, October, 1870.

Ques. "State what sum of money, if any, was paid to the Louisa McKinney, by whom it was paid, and by whom it had been furnished for payment." (p. 371.)

Ans. "I paid myself Louisa McKinney $318.77 at Danville, on or about the 23d October. It was furnished me by Gen. Runkle for payment."

I signed my name to the paper you hand me—the signature below mine is that of W. R. Boice. (p. 371.)

Cross-ex. Did not know Louisa McKinney prior to date of payment. Have no knowledge as to the amount paid Louisa McKinney except from the voucher handed me here. Louisa McKinney was paid between 9 and 10 at night in a house near Richmond, Ky., about 10th of October, a year ago. Can't recollect these dates.

Ques. (By Court.) "Did you turn these vouchers (McKinney and Cavanaugh) over to Maj. Runkle as having been paid in full by you, and receive credit from him for the same?"

A. "I did."

Let it be remembered that H. B. Stanwood was a man who held, as the record shows, for a considerable length of time, a regular appointment as a civilian agent of the Bureau, and that Major Runkle had authority to pay through him, as witness;

Henry B. Stanwood, (p. 368.)

Was employed by accused in Freedmen's Bureau in Kentucky. My commission was dated in April 1870; relieved in September or October, 1870: then acted as clerk for five or six months hunting up claimants.

And if he had not been such agent, the custom and orders of the Bureau warranted the payment through citizens and others not Bureau agents, as witness the following exhibits taken from the records of the Bureau R. F. and A. L., on file in the War Department, and which are specimens of many similar documents;

Endorsement on communication from Frances Taylor, dated Burksville, Ky., June 7, 1870, (T. 96, vol. 7, 1870,) requesting payment of bounty due her as widow of Spencer Taylor, Co. C, 5th U. S. C. C., through the Postmaster or Assistant Assessor of that place.

WAR DEPARTMENT,
BUREAU R. F. AND A. L. CLAIM DIVISION,
WASHINGTON, June 22, 1870.

Respectfully referred to Bvt. Col. B. P. Runkle, U. S. A., Bu. B. F. and A. L., Covington, Ky., to whom the C. D. O. reports vouchers in case sent March 11, 1870; it is suggested that Colonel Runkle pay this case through one of the U. S. officers named within, if, in his opinion, such a course would be safe.

BVT. MAJ. GEN. O. O. HOWARD, *Commr.*

(Signed) W. P. DREW,
Agent Bureau R. F. and A. L.,
Chief of Claim Division.

No. 2.

Endorsement on communication of J. M. Taylor, attorney, &c., dated Bowling Green, Ky., August 14, 1870, (T. 11, vol. 8, 1870,) requesting early payment of certificate No. 531,072, issued in favor of Maria Reagan, as mother of Presley Morrow, late of Co. I, 123d U. S. C. T., and complains of vexations and unnecessary delay in the payment of bounties to colored claimants in Kentucky, and asks that measures of reform be inaugurated.

WAR DEPARTMENT,
BUREAU R. F. AND A. L. CLAIM DIVISION,
WASHINGTON, August 19, 1870.

Respectfully referred to Major B. P. Runkle, U. S. A., agent and D. O. Bureau R. F. and A. L., Covington, Ky., to whom vouchers and funds in the case of Maria Reagan, named within, were sent February 9, 1870. Major Runkle will please take measures to pay the claimant as early as practicable.

The propriety of paying the case through the writer is suggested.

By order of—

BRIG. GEN. O. O. HOWARD, U. S. A.,
Commissioner, etc.

(Signed) W. P. DREW,
Agent Bureau R. F. and A. L.,
Chief of Claim Division.

3.

Endorsement on communication of Docia Bowman, dated Burksville, Ky., September 25, 1870, (B. 57, vol. 8, 1870,) making affidavit that she is the mother of Lewis Motley, deceased, late of Co. I, 115th U. S. C. T.; that she has notified to meet Colonel Benj. P. Runkle at Bowling Green, Ky., on the 9th prox., to receive her money; that she is sixty years old and unable to make the journey, and requests it to be sent to the care of Major W. J. Hobson or W. G. Hunter, &c.

WAR DEPARTMENT,
BUREAU R. F. AND A. L., CLAIM DIVISION,
WASHINGTON, September 30, 1870.

Respectfully referred to Major Benj. P. Runkle, U. S. A., Agent and Disbursing Officer Bureau R., F. A. L., Covington, Ky.

The propriety of paying this case through one of the officers named within is suggested.

The claimant has been informed of this reference.

By order of—

BRIG. GEN. O. O. HOWARD, *Comm'r.*

(Signed) W. P. DREW,
Agent Bureau R., F. and A. L.,
Chief of Claim Division.

The second case relied upon by the Court of Claims to save jurisdiction of the Court-Martial was that of

MAHALA CAVANAUGH.

Specification 5th.—"In this: that *Benjamin P. Runkle*, major, United States Army, retired, being on duty as disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands, and charged as such with the payment of claims of colored soldiers, or their heirs, for moneys due them for military service from the United States; and being as such disbursing officer duly directed to pay, and furnished with sufficient public funds for paying, the claim, amounting to one hundred and sixty-seven dollars and thirty-eight cents ($167.38,) of one Mahala Cavanaugh, widow of Irvine Cavanaugh, late a corporal in Company B, 114th United States Colored Troops, did neglect and fail to pay the same in full, but did misappropriate and apply to his own use and benefit a large portion of the said one hundred and sixty-seven dollars and thirty-eight cents ($167.38,) to wit, the sum of seventy-eight dollars and thirty-three cents (78.33), more or less, public money of the United States as aforesaid. This at or near Richmond, Ky., on or about the 10th of August, 1870."

The finding of the Court on this specification is as follows:

Of the *5th Specification*, "Guilty, except so much thereof as is contained in the following words, viz: 'the same in full, but did misappropriate and apply to his own use and benefit a large portion of the said one hundred and sixty-seven dollars and thirty-eight cents ($167.38), to-wit,' and of the part so excepted Not Guilty."

The finding under the Second Charge, 5th Specification, identical with the foregoing (in effect,) was

"*Not Guilty.*"

EVIDENCE FOR PROSECUTION.

Mahala Cavanaugh, (Claimant,) p. 64.

Lived in Richmond, Ky. She made a claim—don't know the amount.

Ques. "Have you received any money from the Government on account of this claim for your husband's service?"

Ans. "I have."

Ques. "How much did you receive?"

Ans. "$89.05—and that was all."

Don't know who paid her, he had her touch a pen or receipt, &c., and that is all she knows about it. It was paid at her house, 10 at night. Edney Todd and Joe Irwin were present. Was paid a year ago last August 12, 1870.

Cross-ex. Cannot identify the accused as the man who paid her.

Joe Irwin, (p. 70.)

A son of the claimant; saw her paid money from the Government, 12 August, 1870—it was $89.05 in bills—he counted the money for her. Claimant's daughter, Edney Todd, was present. Wm. Burnham came with the man who paid the money. Don't remember the man who paid the money.

Cross-ex. Don't recognize accused as the man who paid the money. It was paid at 10 o'clock at night.

Edney Todd, (p. 76.)

She saw a man pay claimant some money 12th August, 1870, at Richmond, Ky., at 10 o'clock at night. He counted the money—there $89.05. Her brother and Will Burnham were in the room. She dosen't know the man or his name, and would not know him if she saw him.

Cross-ex. Can't describe the man who paid the money. Does not recognize the accused.

Ques. "What money did he say he came to pay—what for?"

Ans. When mother asked him "how much money there was," he asked how much was coming to her. Mother said she didn't know, but there was right smart coming to her. He asked her "how much right smart was," and she said she didn't know. After he paid it he said, here is your money, and mother says, "that is not all the money coming to me." He said, "no this is not the bounty, this is the back pay."

EVIDENCE FOR DEFENCE.

H. B. Stanwood, Bureau Agent, (p. 368.)

Ques. "Who made the 'mark' on that paper?"

Ans. "The mark was made by Mahala Cavanaugh. I saw her make it. I turned this voucher over to General Runkle. Told him it was paid and I received credit for it."

Ques. State what sum of money, if any, was paid to Mahala Cavanaugh at the time of that signing, or about that time."

Ans. I paid her $167.38, or thereabouts. It was 35 or 40, I don't remember which. General Runkle furnished me the money to pay it. I turned it over to him. Told him it had been paid, and I received credit for it.

Ques. by Court, (p. 376.) Did you turn these vouchers (McKinney and Cavanaugh) over to Major Runkle as having been paid in full by you, and receive credit from him for the same?

Ans. I did.

The opinion of the Judge Advocate General of Army on the two foregoing cases, is summed up in these words, quoted by President Hayes, in his order:

"*It is nowhere affirmatively established that he, Major Runkle, appropriated any money to his own use, and for alleged failures to pay, or to pay in full, on the part of Sub-Agents, I am of opinion that the accused can not be justly held liable.*"

The remarks made concerning the finding, &c., in the 1st Specification, 1st Charge, apply with equal force to the 5th Specification under the same charge.

Therefore, the Court could not find Major Runkle guilty of any offense contemplated by the statute of March 2d, 1863, under which he was tried. There was no proper legal conviction, and *without such conviction under these two specifications they can not be relied on to save the jurisdiction of the court.*

We wish further to add here some remarks bearing on the extraordinary decision of the Court of Claims in holding that the findings under these two specification, save the jurisdiction of the Court-Martial.

"The crime charged, as found by the Court-Martial, is divided into three branches. Let us see if this is a true division, and whether the finding made can be sustained.

Taking one of these specifications, we find that it commences by reciting that Major Runkle being on duty as a disbursing officer of the Bureau of Refugees, etc., and charged with the payment of the claims of colored soldiers, or their heirs, for moneys due them for military service from the United States, and being as such disbursing officer duly directed to pay, and furnished with sufficient public funds for paying the claim, amounting to $—— of one ——, did fail and neglect to pay the same (or, did pay thereof only the sum

of $——, and) but did misappropriate and apply to his own use and benefit the said sum of $——; or, (did knowingly and willfully misappropriate and apply to his own use and benefit the balance of the said amount, namely: the sum of $——.) This at ——, Ky., on or about ——, 18—.

It is evident to the most casual observer that the very point and gist of this count in the indictment lies in the charge that Major Runkle misappropriated the money, and applied it to his own use and benefit, yet of this the court finds him "Not Guilty." Suppose as charged, that although supplied with funds to pay, and being a disbursing officer, it was his duty to make payment to a claimant, still he did not, on or about a certain day, pay that particular claimant, is that a crime for which he can be cashiered, fined and imprisoned?

If this be a crime, then every disbursing officer in the employment of the Government is liable to prosecution and punishment, it being only necessary to establish the following state of facts:

Paymaster A had, on or about such a day, public funds in his hand to pay Lieutenant B; it was also the duty of Paymaster A, being a disbursing officer, to pay Lieutenant B; therefore, because Paymaster A did not pay Lieutenant B, on or about that day, therefore Paymaster A is guilty of a crime, although it is conceded that Paymaster A did not misappropriate the money, and there is no evidence that Lieutenant B applied for the money on or about that day. The absurdity of this conclusion is evident, and yet it is necessarily the conclusion to which we are forced to arrive, if we follow the findings of the court upon these specifications, and endeavor to divide each of those under the first charge into two parts, and find Major Runkle guilty of not paying on or about particular days, and "Not Guilty" of misappropriating the money. These specifications cannot be so divided, but must be each taken as one whole and connected charge or count in the indictment, for we find the charge under which these specifications are laid is—

"Violation of the act of Congress, approved March 2, 1863, (chapter 67, section 1,)" which is an act to punish the embezzlement of the public money, and now the court, under this very charge, find Major Runkle, upon these specifications, "Not Guilty" of embezzlement, which is the alleged crime they are to try, but attempt to find him "guilty" of not doing acts at particular times,

when there is no law offered to show that Major Runkle was required to do these acts at any given time, or times, place, or places.

Take for instance a case of embezzlement in any criminal court. A clerk is indicted for embezzlement, and it is charged against him that being furnished by his employer with money to pay a certain indebtedness, he did not, on or about such a day, at such a place, pay the said money, but did willfully misappropriate the same and apply it to his own use and benefit, all this against the statute in such cases made and provided. This I submit is exactly similar to the case of Major Runkle. Now, on the trial, what is it that the jury are to try? Why the question is plain. The point in issue is, did the clerk embezzle the money, not did he on or about a particular day neglect to pay it to his employer's creditor, and if on the trial the jury find that the accused did not misappropriate the money, then I submit that the accused has been acquitted of the charge, and no judge would allow the jury to divide their verdict and find as the court in this case has undertaken to do. It clearly, therefore, cannot be done as was here attempted, and the court having acquitted Major Runkle of the misappropriation of the moneys on these specification, has acquitted him of the only charges in them which were before the court, and therefore has acquitted him on all and each of these specifications. To hold otherwise would lead us not only into the absurdity which I have already shown, but also into, if it were possible, another still greater.

Under the second charge on these same cases, it is charged that Major Runkle did willfully, and with intent to deceive his superiors, and to defraud the United States, and the said claimants cause receipts to be executed by the said claimants on duplicate vouchers, for the payments to them in full of the amounts due, and did thereupon render and return to the Bureau of Refugees, &c., these false vouchers and receipts so executed; thus pretending that these sums had actually been paid by him, and thereby procuring credits for them, when in fact he had not made them.

Now, it was clearly shown by the evidence and admitted by Major Runkle, that these vouchers had been forwarded by him to the Bureau, and in fact they were produced on the trial, and yet the court found that Major Runkle "not guilty" on these specifications specifications under the second charge.

See the absurd effect therefore of these findings; if the action of the court; when it attempted to divide the findings on each of the

specifications under the first charge is allowed to be correct, the whole finding on any of these cases would read as follows:

1st. We find Major Runkle, being a disbursing officer and supplied with funds, "guilty" of not paying such a claimant on or about such a day at such at such a place.

2d. We find Maior Runkle "not guilty" of misappropriating these funds.

3d. We find that Major Runkle did not willfully and with intent to deceive his superiors and defraud the United States cause false receipts and vouchers to be prepared with set forth that these payments had been made, and forward these false receipts and vouchers to his superiors and thereby obtain false credits on them; although it is conceded by him, claimed by the prosecution, and shown by evidence, that he did forward these vouchers, and we have already, in our first finding, found that the payments shown by these vouchers were not made, and therefore these vouchers are false, and also he did receive credits for them. Therefore when we find him "not guilty" we find that he did not cause to be prepared and forwarded these false vouchers willfully and with intent to deceive his superiors and defraud the United States; this means that he did not know they were false when he forwarded and took credit for them; it can mean nothing else. But these vouchers set out that certain payments have been made which, in our first finding we found Major Runkle guilty "of not making," therefore it follows that we find that Major Runkle, when he returned these receipts and vouchers to his superiors and took credit for the payments, as shown by them, believed that he had actually made such payments either in person or through agents, although he had not in fact done so.

This being the finding of the court, Major Runkle is cleared of all guilty intent which is the foundation of and constitutes any crime, and therefore he cannot be guilty of crime under the first finding, for the court itself has shown there was no criminal intent; but he is being tried on a criminal charge; therefore the first finding is superfluous, and not properly made, because Major Runkle is either innocent or guilty of the crime, and on these specifications the court has, upon a full consideration of its findings, as I have just shown, found him innocent of any crime.

We therefore claim that Major Runkle was and should be regarded as acquitted by the Court on the 1st and specifications, under the first charge.

How could the Court of Claims or any other revising authority determine which of the findings of the Court-Martial on the twenty-seven Specifications had weight with the members thereof. If twenty-four of them are thrown out because Major Runkle was illegally on duty at the time the offenses charged in these Specifications were alleged to have been committed, how is the jurisdiction of the Court-Martial to be saved by two Specifications in which the record shows he was *not found guilty of violating the law under which he was tried*, and was *found guiltless* of conduct unbecoming an officer and gentleman?

It is certainly not possible that it can be seriously contended that by merely inserting among specifications certain transactions dated before the claimant's retirement, jurisdiction can be secured for the Court-Martial to try him for alleged offenses, when he was illegally, and without his own fault, on duty. If so, he might have been charged with murder, or any of the catalogue of infamous crimes, have been found guilty of trivial offense not contemplated by the Statutes with as much reason and fairness. Are these two cases all that could be found among the thousands, the money in which passed through Major Runkle's hands during the years before he was retired? It is a slim foundation upon which to build the legal machinery with which to crush one of the soldiers of the Nation.

That soldier begs leave to ask if this is the showing upon which any court will be permitted to deprive him of his honor and his commission, for which he paid with his health, his blood and his fortune in the service of this Republic?

Is this the array of proof to be shown in justification for forcing this soldier to hand down to his children, with a wasted fortune, a torn and bloody uniform and eleven empty commissions gained amid fire and death under the Union's battle flags, the bitter memory of a blackened and dishonored name?

No! it cannot be.

And now, as the remaining Specification through which the Court of Claims trusted to save the jurisdiction of the Court-Martial.

The Appellant begs the Court to give careful attention to this showing. It is the record of an action most cruel and unjust; of violations of law most glaring and outrageous.

The charge is:

"Conduct unbecoming an officer and a gentleman."

The specification:

Specification 14th.—"In this: that *Benjamin P. Runkle*, major, "United States Army, retired, being on duty as a disbursing officer "of the Bureau of Refugees, Freedmen, and Abandoned Lands, and "charged as such with the payment of claims of colored soldiers, or "their heirs, for moneys due them for military service from the "United States; and having in the performance of this duty of the "payment of claims, employed or made use of the services of one "C. D. Smith, a citizen of Paducah, Ky., for the purpose of discov- "ering claimants and paying them amounts due them, and procur- "ing their receipts for said payments, did receive from said C. D. "Smith a letter, of which the following is a copy, viz:

"PADUCAH, KENTUCKY, September 9, 1870.

"BEN. P. RUNKLE,

"*Major, United States Army, Cincinnati, Ohio:*

"Enclosed find a list of persons whose claims have been allowed "but not paid off.

"I do not want to write to General Howard to forward to you any "of them for fear of making some mistake, as I have done in one "instance, in the case of Peggy Turley, mother of William Bennett, "Company E, 8th, in which case the reply was that the vouchers "had been returned to that office by you *paid*. She is now with "her son Tom Turley, near this place, and I think she had better "be settled with. They don't know what the answer is, as I have "told them that I would write you. Her son Tom knows how to "make a fuss.

"Also, I have to inform you that I have found near here, the only "child, now grown, that Perry McCracken left; send me the vouch- "ers and they can be 'fixed.'

"Also, I send you the claim of Betty McGuire's children, which "I thought had been sent to your office, but had not; I found it "since you left here.

"Jackson Patterson, of whom I spoke to you as not having been "paid, was here yesterday, and if he don't get his money I can't be "answerable any longer for the consequences, $187.50. You can "send it less $25, and he will accept that.

"You recollect you agreed to send me $61 for the sister of Sam "Holmes. She lives in town, and says the sooner she gets, &c.

"Enclosed I send you some vouchers for payment.

"C. D. SMITH.

"And further, that the said *Benjamin P. Runkle* did read the "aforesaid letter, which contains dishonest and dishonorable propo- "sitions, made to him by the said C. D. Smith, but afterwards, and "with a full knowledge of the contents of said letter, did continue to "employ the said C. D. Smith as an assistant and agent for him, "*Runkle*, in the disbursement of public moneys. All this in the

"States of Kentucky and Ohio, on or about the month of Septem-"ber, 1870."

The finding of the Court on this specification was a follows:

Of the *14th Specification*, "Guilty, except so much thereof as is contained in the following words, viz: 'and paying them amounts due them, and procuring their receipts for said payment,' and also the words as an assistant and agent for him, *Runkle*, in the disbursement of public moneys,' and of the part so excepted, Not Guilty."

It is submitted that this finding takes the whole life and strength out of the specification, leaving it worthless as supporting the charge.

Remembering that there was no charge of conspiracy with Smith to defraud; nor a line of evidence to prove one, let us examine what is left of this specification.

Simply two allegations.

1st. That Major Runkle used C. D. Smith, a claim agent, to discover the whereabouts of colored soldiers.

2nd. That he read a letter from said Smith, which letter contained dishonest propositions.

Suppose the first allegation was true, would it constitute conduct "unbecoming an officer and gentleman?" Suppose no other man knew the whereabouts of the soldier or could identify him, what was to be done? The Record of the trial shows that there was often great difficulty in identifying claimants to bounty, and, notwithstanding every precaution, mistakes were made.

It is submitted that such charges as "conduct unbecoming an "officer and gentleman," should be carefully guarded. If Major Runkle could be found guilty of such conduct for permitting a claim agent to bring in his clients, or for even sending him out after them, he might be found guilty of such conduct for hiring a man of bad character to carry a trunk, or black his boots. The peculiar notions of a court might lead to great absurdities.

But it is necessary that attention should be given to the evidence produced to support this specification, not only to show of what the Court found Major Runkle guilty, but the further and very important fact that in the order of Secretary Belknap, the testimony of the only witness, that goes to sustain the charge that Major Runkle read the letter was stricken out, and the assumed approval of the finding under Charge Second based on other specifications.

As to the first allegation that Major Runkle employed C. D. Smith in any capacity whatever, the testimony was:

C. D. Smith, (p. 362.)

Have lived in Paducah, Ky., since February, 1867. Have known General Runkle since 1866. Am an attorney at law and claim agent. Have assisted in a great many cases in the discovery and identification of claimants within the past three years. The last was in the fall of 1871. Never paid any bounties. I found and identified claimants for Keyes, Runkle and Ray.

Cross-ex., (p. 367.)

Never paid a bounty case for accused. The business I transacted for Major Runkle at the office of J. E. Woodward, in Paducah, Ky., was to give him information in regard to claimants that I knew.

J. E. Woodward.

I am surveyor of the port at Paducah, Ky.; have lived there thirteen years; know C. D. Smith, an attorney in Paducah; office in same room; became acquainted with General Runkle two or three years ago. General Runkle and Smith met at my office several times; the last time was a year ago next month. General Runkle was in my office several times during his stay in Paducah. Don't know of any business General Runkle did then with Smith. Only know that Runkle paid off colored men. Smith and Runkle had interviews at my office every time Runkle was in town. Don't know that Smith was employed by accused in the Bureau business. It appeared to me that Smith would get the claims of colored men, and Runkle would come there and pay them off. "Smith would get him the names of the men. That was all I saw."

Cross-ex. The office I name was a public office. Smith occupied this public office by my permission. Smith had been at Paducah six or seven years, and was largely acquainted with the colored people. The last two or three times Runkle was in Paducah he stopped at my house.

This shows that Major Runkle used Smith just as he might have used any other claim agent who knew the whereabouts and identity of colored soldiers, employed him just as other Bureau officials employed him, and transacted all his business with said Smith, in the public office of a United States Government official. Of so much the Court-Martial found him guilty, but does that support, or, could the court have considered that it supported the charge?

As to the second allegation; that Major Runkle read the letter said to have been written by Smith.

If he had, and yet permitted Smith to bring in his clients, which he could not well prevent, the fact would hardly support so grave a

charge. Even United States officials are sometimes compelled to do business with designing rascals.

But here is the evidence.

P. J. Overly, (p. 207.)

Was a clerk in the Freedmen's Bureau, in Covington, Ky., in 1870, under General Runkle; knew C. D. Smith, of Paducah, Ky., don't know that Smith was employed in any capacity by General Runkle.

Ques. p. 208. Do you know of a letter having been received at the office of the accused signed by C. D. Smith, dated at Paducah, and addressed to the accused in September, 1870?

Ans. Along about that time there was a letter purporting to be from C. D. Smith, as stated, addressed to the accused.

Ques. When and where did you last see that letter and in whose possession was it?

Ans. It was in my possession the time that I last saw it; I don't remember the date.

Ques. Have you the original letter now?

Ans. No, sir.

Ques. What did you do with it?

Ans. I destroyed it.

Ques. Was it ever in the possession of the accused?

Ans. Not to my knowledge, further than to take hold of it.

Ques. Did you make a copy of that letter?

Ans. No, sir.

Ques. Do you know that a copy of that letter was made by any person?

Ans. I don't know that a correct copy was made by any one.

Ques. Look at the paper now shown you and state whether it is a copy of a letter from C. D. Smith to the accused, referred to in your previous answer.

[The accused objects because there is no testimony tending to show that the original was the letter of the person by whom it purports to have been written, and no testimony to show that it was read by the accused. Objection *not* sustained.]

Ans. I cannot say that it is a true copy; I never copied the letter.

Ques. Do you know the handwriting of the paper which has just now been shown, and whose?

Ans. It is my handwriting.

Ques. Did you read the letter from C. D. Smith to the accused?

Ans. The letter purporting to be from C. D. Smith I read.

Ques. How long after its receipt at the office was it destroyed by you?

Ans. I cannot say the time; it was not a great while.

Ques. State as near as you can.

Ans. It was shortly after, but I can't give the date, &c.

Ques. Was it a week after?

Ans. I presume it was more than a week.

Ques. During the time that elapsed between the receipt of letter and its destruction by you where was it, and in whose possession.

Ans. It was on the desk of Lieutenant Keys, in the office, for some time, and then it was in my possession after that for a time.

Ques. Was Mr. Keys in the office of the accused?

Ans. Yes, sir; in the building kept as a Bureau office

Ques. Was Mr. Keys a clerk in the Bureau?

Ans. He was an officer in the Bureau; he was Lieutenant and acting as Adjutant.

Ques. Whose Assistant Adjutant General was he?

Ans. General Runkle's.

Ques. State what this paper is &c.

Ans. As I stated, it purports to be a copy of a letter purporitng to be from C. D. Smith.

Ques. Are the words in this paper your own words, or whence did you obtain them?

[Objected to by the accused, because the answer would involve improper testimony as to the alleged original letter. Objection *not* sustained.]

Ans. From a copy of a letter purporting to be a copy of a letter purporting to be from C. D. Smith.

Ques. Did you ever compare this copy with the original?

Ans. No, sir.

Ques. From your recollection of the contents of the original letter, state whether this paper shows such contents.

[Objected to by the accused, because it is a leading question, and because the paper was not compared with the original. Objection *not* sustained.]

Ans. I don't know that it does; it may not agree in the words or running of the letter.

Ques. Do you recollect what the original did contain?

Ans. No, sir.

Ques. When was this letter written purporting to be a copy?

Ans. I think it was in September, 1870.

Ques. p. 216. Was the paper written before or after the original was destroyed?

Ans. Before.

The Judge Advocate proposed to offer in evidence the paper first offered to the witness, [i. e. the copy of a copy of alleged letter from C. D. Smith to General Runkle.] The accused objected, because there is not a sufficient evidence that it is a true copy, and because there is a affidavit attached to it which it would be improper for the court to read.

Judge Advocate. The paper was copied by a man who had read the original letter, and who now testifies that this purports to be a copy. I offer it for what it may be considered worth.

Page 221. (Objection *not* sustained and paper accepted.)

The Judge Advocate read the paper, (Ex. No. 18.) The accused asked that all the statesments of the last witness, relative to the paper, (Ex. No. 18,) be not considered as evidence, the paper itself not having been offered as evidence.

The Court *did not* grant the request.

Cross-ex.

Ques. What did you mean by saying that *the accused had the letter purporting to be from C. D. Smith, or touched it?*

Ans. When he returned to the office I had the letter; I went into his room with other letters and reached them to him.

Ques. What then became of the letters?

Ans. He was sitting with the desk over to his left, and he threw them all over on his desk or table as soon as I handed them to him.

His office was on the first floor; Capt. Keyes was on the second floor. There were a dozen or fifteen letters received that day, as near as I can remember. He did not open the letter whilst I was there; don't know that he ever opened that letter. I saw it about two hours afterward lying with the other letters on the desk where he threw it. I put it in my pocket, and carried it home and threw it in a trunk where I kept papers, where it remained for a month or may be two months. Don't know when I next took the letter in my hand, but when I did I destroyed it; don't know that any one

had it in the meantime. No one copied it after I took it the second time; never saw any one copying it at any time.

Ques. "When you say that the paper shown you here to-day is a copy of a paper purporting to be a copy of a letter purporting to to be from C. D. Smith, what do you mean?"

Ans. "I mean that was a copy of a letter brought to me, and the party stated that it was a copy of a letter purporting to be from C. D. Smith."

Ques. "Who was that party?"

Ans. "S. S. Wager. The copy Wager handed to me was in handwriting; so far as I know it was made in Gen. Runkle's office soon after I opened the letter."

Ques. "What do you mean by saying you opened the letter?"

Ans. "I opened the letter as it was thrown on the desk of Lieut. Keyes when the mail was brought to the office.

I don't remember that it was opened before I first saw it.

I don't think Gen. Runkle read half of the letters brought to him. In the General's absence Lieut. Keyes opened the letters. The copy of C. D. Smith's letter was made prior to my seeing the original the second time. The accused was only in the office a short time that day.

On Re-direct Ex. witness testified that—

When accused received his official letters he would look over one or two and then throw them down—he did not read more than half of them. From the position he threw them on the table, and the position I found them in I judge he did not take them and read read them after I went out.

The writing of the letter purporting to be from C. D. Smith looked like Smith's hand. Wager asked me to make a copy of this letter he had made. I did so, and then destroyed Wager's copy with the original."

What have we here? A witness producing what he says in a paper purporting to be a copy of a copy of a letter purporting to have come from C. D. Smith, which letter he purloined from the office of Major Runkle, some one copied it and he destroyed it, and this worse than secondary evidence, the spawn of a vile blackmailing conspiracy, is received by the court-martial in spite of the objections of the claimants counsel; that the letter was received in the absence of Major Runkle; that on Major Runkle's return this witness handed Major Runkle the letter, with a dozen or fifteen others;

that Major Runkle did not open the letter then, but threw it with the others on the table; that shortly after (two hours) the witness found the letter on the table precisely where Major Runkle left it; put it in his pocket, carried it away, and retained it in his possession until he destroyed it.

Is it possible that the court-martial could have found Major Runkle guilty of dishonorable conduct upon such evidence as this? No, and it is a shame that the highest court in the Nation should be compelled to look into the dirty villainy of such petty conspirators as these witnesses show themselves, by their own testimony, to have been.

But here follows the evidence of another manipulator of letters (of whose character all can judge, both from his own testimony and that of E. W. High), and is more to the point.

This is the man whose evidence was rejected by the authority undertaking to review the Court-Martial proceedings, and it will be noted that his is the only testimony given to support this 14th Specification.

S. S. Wager:

Mr. Overly handed me a letter to read that was signed by C. D. Smith, and I read it. About two days after its receipt at the office Mr. Overly made a copy of the letter before he handed it to me, and another a day or two afterwards. I examined the copies with the original. Ex. No. 18 is a copy of the letter that was made by Mr. Overly. Don't know that the accused had the original lettar from C. D. Smith.

Cross-ex., S. S. Wager.

Don't know when Smith's letter was received at Bureau office, or who got it from the mail. Accused was in Washington when the letter was received. Saw letter lying on the desk of the accused two or three times after he had returned from Washington. I am now a clerk in the War Department, since May 20.

"The paper handed me is in my handwriting and directed to Colonel Runkle." (Ex 68)

[Ex. 68 offered in evidence as showing witness' attempt to levy blackmail, &c. The Judge Advocate objected. Objection *sustained.*]

Witness admits Ex. Nos. 20, 21 and 22.

Ques. "Had you not, some time in the latter part of March or the early part of April, 1872, at the office of the Freedmen's Bureau, at Louisville, Ky., a conversation with P. J. Overly, who

has been examined as a witness in this case, and did you not in said conversation say to said Overly that you had been offered a clerkship in the War Department if you would furnish evidence against the officers of the said Freedmen's Bureau in Kentucky, and did you not then and there mention the name of the accused as among the officers against whom that evidence was desired to be furnished?"

Ans. "I did have a conversation; I did say to him, and emphatically told him that I had refused it. It is very possible that I did mention the name of the accused."

Ques. "Did you not say that the salary of said clerkship would be $100, and that Major Clapp had made the offer and could give it?"

Ans. "I did so, sir."

[Accused asked reconsideration of last decree of court of yesterday. Granted, but *declined* to change order.]

Cross-examination of Wager continued:

Ques. Did you not, after the said conversation with Overly, receive the appointment referred to?

[Judge Advocate objected, because irrelevant. *Sustained.*]

Ques. "Did you not, in conversation with E. W. High, on or about the 21st of January, 1872, in Louisville, say, in substance if not in terms, 'damn Runkle; if he does not keep me in office or provide for me I will make him smart?'"

Ans. "I didn't, sir; did not make threats against Runkle to Graham nor Theodore O'Neal, in Cincinnati nor to Burbridge."

The following is the evidence of E. W. High, regarding this witness for the prosecution, who gives the only testimony supporting the charge that Major Runkle read the letter:

E. W. High, (p. 521.)

Knew Mr. Wager first in 1869 in Louisville, Ky. Witness was asked what Wager had said to him about accused.

Judge Advocate objected, and *objection sustained.*

Ques. Did Wager say to you on any occasion "Damn Runkle. If he does not keep me in office or provide for me, I will make him smart"? (p. 525.)

Objected to; objection not sustained.

Ans. "He certainly did." (p. 528.)

Ques. "Did Wager say to you in 1871 or 1872, 'Damned if he would be put out of office—that he had his thumb on Maior Runkle, and he dare not do it?'"

Ans. "In the year 1871, Mr. Wager used such language to me; at the office of the Freedmen's Bureau in Kentucky."

Ques. State if S. S. Wager, in March or April, 1872, when you asked him the duties of the appointment he was to receive, said in substance: "Nothing; I am to remain at Lebanon—sit, [down,] smoke my pipe, and draw my $100 per month, and await orders."

Ans. "That was in substance, I think, what he said."

But no matter about his character, the Court-Martial committed a fatal error in connection with the admission of his testimony.

In the order of the Secretary of War, approving the proceedings and announcing the sentence are these words:

II. "The proceedings of the General Court-Martial in the fore-"going case of Major *Benjamin P. Runkle*, United States Army, "(retired,) are approved, with the exception of the action of the "Court in rejecting as evidence a certain letter written by a witness "for the prosecution, and offered to impeach his credibility; also in "unduly restricting the cross-examination of the same witness in re-"lation to the motives influencing his testimony.

"Inasmuch, however, as in the review of the case it was deter-"mined that the *whole testimony of this witness could be excluded "from consideration* without impairing the force of the testimony of "the prosecution, upon which the findings rest, the erroneous action "of the court in this respect does not affect the validity of the sen-"tence."

And thus the evidence given by S. S. Wager disappears from the case, and with it the 14th Specification, 2d Charge, and with them all claims that this Specification saves the jurisdiction of the Court must also disappear.

No conviction can be claimed upon this Specification, and it will not avail to save the jurisdiction of the Court-Martial.

In regard to the remarks of the Court of Claims touching the power of a Court-Martial to find an officer guilty of conduct unbecoming, etc. The Court of Claims, quoting Winthrop's Digest whatever that may be, says: "It is not necessary that the act or "conduct of the officer should be immediately connected with or "should directly affect the military service. It is sufficient that it is "morally wrong and of such a nature that, while dishonoring or dis-"gracing him as a gentleman, it comprises his character and posi-"tion as an officer of the Army."

In this the Court means to assert, if it means anything, that there is a crime known to the law as conduct unbecoming an officer and gentleman. This according to the Court, or the unknown digest, is a moral wrong that dishonors or disgraces an officer. It does not apply to a private who is not supposed to be a gentleman, and can serve his country as a soldier without being affected by dishonor or disgrace. It can not be brought against any citizen in civil life. A complaint made to a grand jury that a party had been guilty of conduct unbecoming an officer and gentleman would be relegated to things that amuse. But in the eyes of this erudite court so much enlightened by Winthrop's Digest, it is in itself a grave offence, and will alone justify the punishment of an officer when such is held guilty by the court.

Now what constitutes the difference between a citizen of the Republic and an officer of the army on the retired list who is not under the rules of discipline and under the law, is not subject to orders from any military source, is hard to understand.

If your honors please, this phrase of "conduct unbecoming an officer and gentleman" has the same meaning and significance as the charge made in an indictment of an offense "against the peace and dignity of the State," It is a mere form through which the crime is set forth in the charge before a Court-Martial or embodied in the counts of an indictment. If on trial the counts of the one or the specifications under the other are not sustained by proof, there is nothing left of the charge of an offense against the peace and dignity of the State, or in conduct unbecoming an officer and gentleman upon which to found a verdict. A citizen is a criminal and offends the peace and dignity of a State by the committal of a crime, an officer in like manner assaults the service in conduct unbecoming an officer and gentleman when guilty of a crime recognized by the code of criminal law.

It seems an abuse of your Honor's patience, and an absurd waste of good paper to argue a proposition so plain as the foregoing, but I desire to invite your Honor's special attention to the fact that the condemnation of a gallant officer upon whose good name and brilliant record not the shadow of a taint was ever cast, and who was actually acquitted on the 1st and 5th Specifications under both charges, and the evidence supporting the 14th Specification, Second Charge, was stricken out by the supposed reviewing authority; and

that upon these three Specifications the Court of Claims proposes that the jurisdiction of the Court-Martial shall rest. I desire, I say, to invite your attention to the fact that this condemnation to a punishment more terrible to him than death, is upheld by the Court of Claims upon a vague and general supposition of conduct unbecoming an officer and gentleman, and that this high Court actually quotes a so-called digest, never before recognized, to the effect that conduct morally wrong compromising the reputation is sufficient to sustain a verdict of guilty of a criminal offense, although the offense was not and could not be proven. What the learned Court means, if it means anything, is not that the character is compromised, for that can be done only through the commission of some offense or crime, but that the reputation, which depends upon the opinion of associates has been damaged and its unfortunate owner can, therefore, be subjected to an extreme punishment. This fetches us to the climax of absurdity. The Court-Martial in utter disregard of both form and substance found in the law of evidence, condenses into a judgment general opinion which seems to have been that of both Courts in advance of any proof whatever.

To state the case as briefly and clearly as possible, the Court of Claims, to save the jurisdiction of the Court-Martial, holds *that having got the defendant into Court on charges of offenses he did not commit, he can then be tried for offenses barred by the statutes*, and thus, securing their hold, the Hon. Court "proceeds to graver matters," which means to condemn on an obscure charge of a moral sort set forth in the unknown digest, and no where else recognized, as bad character (reputation) which unfits an officer to associate with gentlemen.

There is in this connection a most extraordinary condition that goes to show that the Court of Claims was as oblivious to the facts of the case as it seems ignorant of the law. After its fatal admission of non-jurisdiction the Court seeks to avoid by the assertion that the defendant Runkle "was on duty when that act [act ordering "retired officers relieved] was passed January 20, 1870, was still on "duty when he was placed on the retired list December 15, 1870, "and remained on duty without any new assignment to it, till he "was arrested for trial in the autumn of 1872." That is to say because he was not assigned to duty after the passage of the Act of January 20, 1870, the law did not apply to his case. Now I am saved an argument upon so monstrous a proposition by the facts.

The law passed January 20, 1871. It required that retired officers should be relieved within thirty days. Major Runkle was retired December 15, 1870, and should have been relieved immediately but was not relieved for more than six months to-wit, July 1, 1871. He did not remain on duty * * "till he was arrested for trial in the fall of 1872." The War Department admitted the legal necessity for his relief July, 1871, and did not arrest him for trial until July, 1872.

It is further submitted, that if the court erred, *as the order approving the sentence declares*, "in rejecting as evidence a certain "letter written by a witness for the prosecution, and offered to im- "peach his credibility; also unduly restricting the cross-examination "of the same witness in relation to the motives influencing his testi- "mony" *this error vitiated the whole proceedings, they were null and void, and no approval whatever, or by whomever made could cure the defect.*

The evidence of the chief (and in effect only witness) testifying in behalf of the prosecution in this 14th Specification is thrown out by the reviewing authority because the Court-Martial refused to admit a letter tending to impeach his credibility and unduly restricted his cross-examination, and yet it is claimed that the findings should stand, and the Court of Claims goes so far as to rest the jurisdiction of the Court-Martial on this very 14th Specification. As well say that when one juror is disqualified the verdict of murder shall stand because the eleven men were church members in good standing and could therefore be trusted.

This, it is submitted, disposes of the holding of the Court of Claims, that these Specification save the jurisdiction of the Court-Martial, and we can "pass" with the Court, to "graver matters."

The next question is as to the approval of the proceedings, findings and sentence by the President of the United States, as the law required.

The Appellant claims that the Court below erred in holding the approval of the proceedings, finding and sentence of the Court-Martial by Wm. W. Belknap, Secretary of War, to be the approval of the President of the United States required by law.

The complainant contended:

That there was no review and approval of the proceedings, findings and sentence; that if there was, the record does not show such approval on its face, and the same cannot be presumed. Or, to state the case in the words of General Charles Ewing (one of the counsel for Major Runkle), who was a gallant soldier, a thorough lawyer, a true friend and Christian gentleman:

"The record does not show that the 'whole proceedings,' includ-
"ing finding and sentence, were laid before the President of the
"United States, and by him confirmed or modified, but, on the
"contrary, it does show that the record was reviewed and the order
"approval made by the Secretary of War, in his own office, and
"in his own name."

This proposition is proved by the Official Record of the Court-Martial. When this document was laid before President Hayes, there appeared upon it but one endorsement as follows:

The proceedings of the General Court-Martial in the foregoing case of Major Benjamin P. Runkle, United States Army, (retired), are approved, with the exception of the action of the court in rejecting as evidence a certain letter written by a witness for the prosecution, and offered to impeach his credibility; also, in unduly restricting the cross-examination of the same witness in relation to the motives influencing his testimony.

Inasmuch, however, as in the review of the case it was determined that the whole testimony of this witness could be excluded from consideration without impairing the force of the testimony for the prosecution, upon which the findings rest, the erroneous action of the court in this respect does not affect the validity of the sentence.

The findings and sentence are approved.

In view of the unanimous recommendation by the members of the court that the accused shall receive Executive clemency on account of his gallant services during the war, and of his former good character; and in consideration of evidence by affidavits, presented to the War Department since his trial, showing that accused is now, and was at the time when his offense was committed, suffering under great infirmity in consequence of wounds received in battle; and credible representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be duly executed."

W. W. BELKNAP,
Secretary of War.

This endorsement is not dated at the Executive Mansion, but at the War Department (see record;) it is not signed by the President,

but by the Secretary of War; it recites that the evidence on which part of the sentence was remitted, was submitted, not to the President, but to the War Department. It does not state that the "*whole proceedings*" had been laid before the President as the law directs. It does not show that the President ever saw the record, or that the "proceedings, findings and sentence" were either confirmed or disapproved by him as required by law; but, on the contrary, it bears on its face conclusive evidence that the Secretary of War alone passed upon the "proceedings, findings and sentence," and made the only approval that was made.

This endorsement was accepted by the Adjutant General of the Army as the "statement" of the reviewing officer, which the law says shall appear upon the record before the sentence can be executed, *i. e.*, in the language of the Attorney General, it was thought to be "*the final judgment.*" It will be observed that it does not purport to be the certificate of one official as to the act of another official, as does the certificate of the clerk of a court, but is intended to be and is an original act by an official exercising power inherent in his office. It says the "*proceedings* of the General "Court-Martial in the foregoing case of Major Benjamin P. Runkle "*are approved.*" * * * and "The findings and sentence *are* "*approved*" It does *not* say that these approvals are made *by the President* or *by order* of the President; it simply states that the proceedings, &c., are thereby approved; it follows that these are the approvals of the official who made the endorsements. This endorsement is then the "statement"—the judgment—of the official whose signature is appended thereto—*i. e.*, the judgment of W. W. Belknap, Secretary of War.

"The power to review and confirm the sentence of a Court-Martial involving death, imprisonment or cashiering, is vested by law exclusively in the President, and is a judicial function, which cannot be delegated or vicariously exercised." (65 Article of War, A. R., 1863, p. 495; Report Attorney General of England, quoted in "Clode's Military Forces of the Crown," Vol. 1, p. 515; O'Brien's American Law, p. 278; Opinions Attorneys General, Vol. 2, p. 289; Opinions Judge Advocates General, title "Reviewing Officers," "Approved and Disapproved," I, and "Record," IV, 16 and 17.)

It is, may it please the Court, we believe, well settled that Courts-Martial are courts of limited and special jurisdiction; and that it is essential to the validity of the judgments of such a court that its re-

cord should show affirmatively that it had jurisdiction, and that all of the proceedings were strictly formal. Where this is not shown on the record of the court, its judgment has always been held to be a *nullity*.

Courts-Martial in the Army of the United States are regulated by "The Rules and Articles of War," and "The Rules and Regulations for the Government of the Army." The former are embodied in the Statutes at Large, and of the latter this Honorable Court has already said: (4 How. 117.) "As to the Army Regulations, this court has too repeatedly said that they have the force of law to make it proper to discuss that point anew."

These laws have been expounded by the Judge Advocates General and by the Attorneys General of the United States, and all officials whose duty it is to administer justice in the army, or to protect the citizen in his rights as a soldier must be guided by these laws and decisions.

The sections of the laws named above that relate to the questions under consideration are as follows:

1st. The act of July 13, 1886, (S. L., Vol. 14, p. 92,) which declares that "no officer in the military or naval service of the United "States shall, in time of peace, be dismissed from service except "upon and in pursuance of the sentence of a Court-Martial to that "effect, or in commutation thereof."

2d. The 65th Article of War, which says: "Any general officer "commanding an army, or Colonel commanding a separate depart- "ment may appoint Courts-Martial whenever necessary. But no "sentence of a Court-Martial shall be carried into execution until "after the whole proceedings shall have been laid before the officer "ordering the same, or the officer commanding the troops for the "time being; neither shall any sentence of a General Court-Martial, "in the time of peace, extending to the loss of life, or the dismission "of a commissioned officer, or which shall, either in time of peace "or war, respect a general officer, be carried into execution, until "after the whole proceedings shall have been transmitted to the Sec- "retary of War, *to be laid before the President of the United States "for HIS confirmation or disapproval*, and orders in the case. All "other sentences may be confirmed and executed by the officer "ordering the court to assemble, or the commanding officer for the "time being, as the case may be."

3d. The act of July 20, 1868, by which it is enacted "That no "officer of the Army of the United States who has been, or who may "hereafter be cashiered or dismissed from the service by the sen- "tence of a General Court-Martial, *formally approved by the proper "Reviewing Authority*, shall be restored to the military service ex-

"cept by a re-appointment, confirmed by the Senate of the United "States." (S. L., Vol. 14, p. 125.)

It will be observed that the act of 1866 declares that a commissioned officer cannot be dismissed in time of peace except on the sentence of a Court-Martial, and that the Article of War provides "that no sentence of a Court-Martial shall be executed until after the whole the proceedings have been laid before the reviewing officer and the sentence has been confirmed by him." In the act of 1868 the confirmation required by the Article of War is called a "formal approval."

It follows, therefore, that an officer of the army cannot be deprived of his commission in time of peace, on an order of the War Department that is founded simply on a judgment rendered by the President *unsupported* by the "proceedings, findings and sentence" of a Court-Martial; and that such an order has no legal effect if it be issued in pursuance of the sentence of a Court-Martial which *has not* been "formally approved" by the President of the United States.

Applying this conclusion to the case, now before your honors, I will say that if the War Department order in Runkle's case was issued in pursuance of the sentence of a General Court-Martial legally convened, organized and properly conducted, *formally approved by the proper Reviewing Authority*, it was a valid order, and Runkle ceased to be an officer of the army on the date of its issue. But if that order was not so issued it had no legal effect, and the proceedings of the Court-Martial in his case had not been concluded, but were waiting the action of the proper reviewing authority when President Hayes acted on the record of the court.

The official record shows that W. W. Belknap, Secretary of War, assumed to act as the Reviewing Authority in Runkle's case, and that in fact he did review and approve the proceedings, findings and sentence. This, as we have seen, he could not do by virtue of any power conferred upon the Secretary of War by any law governing military trials, for these laws do not in any contingency make the Secretary of War a reviewing offfcer. There is no question as to who was the reviewing officer in the case; the law is quite clear on this point; it says that the *whole record* should be sent to the Secretary of War, not for *his* approval, but *to be laid before the Presi-*

dent of the United States for his confirmation—i. e., for his "formal approval.

This is an admitted fact.

Now it has never been asserted that the President's "formal approval" or "confirmation" does appear in this case; indeed, the record shows that President Grant did not review and approve, or take any other action in the premises. It follows, therefore, without the shadow of a doubt, that the War Department order that declared Runkle dismissed the service, was an illegal order, and that this gentleman has been continuously, from the date of his retirement, a Major on the retired list of the army.

The only possible escape from this conclusion is found in the assertion that although the law does make the President the Reviewing Authority in such case, still the legal presumption is that the act of the Secretary of War was the act of the President, and that his endorsement on this record was the formal approval of the President, that the law directs shall appear before the sentence can be executed.

This I deny. There is no legal presumption that can affect this record except this, *i. e., that the record itself shows all that has been done in the premises.* The law does not give the Secretary the power to do this act for himself, or for the President. It nowhere appears on the record that the President directed him to do it, and further, it is no more competent for the President to delegate this power than it is for him to authorize another to sign acts of Congress, pardons, reprieves—or the sentence of death. *The law* says the President shall formally approve the sentence of dismissal, and the practice of the service, and opinions of the Judge Advocates General show that the formal approval of the Reviewing Authority of any Court-Martial must be in writing, on the record, and *signed* by the Reviewing Authority.

It is well known to all military men, and to all lawyers who are familiar with the proceedings of courts-martial that a military trial is not conducted, as are civil trials, before judge and jury sitting together, where the law and facts are settled, a verdict rendered and judgment pronounced. On the contrary, a military trial is divided into two distinct parts entirely separated from each other in time and place, and neither of the parts standing alone is of any value or force. An officer on his trial is arraigned before an assemblage of

officers detailed for the purpose, who hear and record the evidence, enter up an opinion as to the innocence or guilt of the accused, and *suggest* the punishment that they think should be inflicted. All of the proceedings had by these officers, including the evidence heard by them, must be reduced to writing, and this "record" being authenticated by *the signature* of the officer who presides over the assembly and by the *signature* of the officer who acted as recorder, is forwarded to the reviewing officer.

When a trial has proceeded in due form up to this point, the officers who sat on the first part of the trial have discharged their duty and have no further power in the premises. Still the action taken by them, though adverse to the accused, has not ripened into a conviction. The whole action so far is less even than the verdict of a jury without the sentence of a judge. Their proceedings have no vitality or power until the Reviewing Authority by his *formal approval* pronounces his sentence. But when the Reviewing Authority has acted upon the case, he completes the trial. He makes of it a complete judicial act when he *reviews—i. e.*, when he examines critically and deliberately—the whole record of the proceedings, including the evidence, and *formally approves* the same.

Of the action of the Reviewing Authority, Attorney-General Bates says, (and here quote this because as this question is a novel one the opinion is of importance:)

"Undoubtedly the President, in passing upon the sentence of a "court-martial and giving to it the approval, without which it can "not be executed, acts judicially. The whole proceeding from its "inception is judicial. The trial, finding and sentence are the solemn "acts of a court organized and conducted under the authority of and "according to the prescribed forms of law. It sits to pass upon the "most sacred questions of human rights that are ever placed on trial "in a court of justice; rights which, in the very nature of things, "should neither be exposed to danger nor subjected to the uncon- "trolled will of any man, but which must be adjudged *according to* "*law*. And the act of the officer who reviews the proceedings of "the court, whether he be the commander of the fleet or the Presi- "dent, and without whose approval the sentence cannot be executed, "is as much a part of this judgment, *according to law*, as is the trial "or sentence. When the President, then, performs this duty of ap- "proving the sentence of a court-martial dismissing an officer, his "act has all the solemnity and significance of the judgment of a "court of law," (O. A. G., vol. xi, p. 21.)

And Attorney-General Cushing says:

"The decision of the President of the United States in cases of "this sort [courts-martial that cashier an officer] is that of the ulti- "mate judge provided by the Constitution. Like that of any other "court in the last resort of law, it is final as to the subject matter." (O. A. G., vol. x, p. 370.)

The action of the Reviewing Authority in a court-martial case is, then, *the judgment;* it is final; there is no appeal from it.

It will be observed that this judicial function is not an original power in the President, for the Constitution provides that "the Congress shall have power to make rules and regulations for the government of the land and naval forces of the United States." (Art. I, Sec. 8.) "The Congress" has exercised this function in its adoption of the Rules and Articles of War and the Rules and Regulations for the Government of the Army. In the 38th chapter of the last of these acts Congress *delegates* the "judicial" power in the army to certain officers, and, in the following words, prescribes the manner in which they shall discharge it: "Every court-martial shall keep a "complete and accurate record of its proceedings, to be authenti- "cated by the signature of the President and Judge Advocate. * * "(Sec. 861.) The Judge Advocate shall transmit the proceedings "without delay to the officer having authority to confirm the sen- "tence, *who shall state, at the end of the proceedings in each case, his "decision and orders thereon.*" (Sec. 896.)

Any official when acting as Reviewing Authority is bound to this law to "state at the end of the proceedings in each case his decision and orders thereon." It will be observed that this law directs that the Reviewing Authority's statement *shall be made at the end* of the proceedings in *each* case. So that if the record of a court embracing the trials of a dozen officers is laid before him he cannot "state" his decision in lump, but must state a decision at the end of each case separately. It cannot, therefore, be denied, I think, that the "statement" that is here required is a written statement. True, the word "written" does not appear in the law, but neither does the word "verbal," and as the law requires that the Court-Martial shall make a record of all its proceedings, and that the President and Judge Advocate shall sign this record, and then directs that the Reviewing Authority—the authority that takes the final action and gives life to all that has gone before in the trial—shall "state" his "decision at *the end of the proceedings in each case,*" it is quite evident that the statement here meant is a written statement.

Now where the law requires an officer to discharge a given duty as it evidently does in this case, by a decision in writing, it follows, I submit, as a matter of course that he must authenticate his decision by his signature. Attention is here directed to the fact that the law provides a "recorder" for the court, who certifies *over his signature*, the judgment of the court, but that neither the law nor the usage of the service gives the reviewing officer a recorder or authorizes any one to enter up his judgment—it says that *he* SHALL STATE HIS DECISION AND ORDER ON THE RECORD AT THE END OF THE PROCEEDINGS IN EACH CASE. Certainly there can not be any official act of greater moment to the citizen than this statement of the Reviewing Authority in a case like the one under consideration. It is the most vital part of the whole proceedings, and it would be absurd to hold, as it is held by all of the Judge Adjocates General and by Attorneys General, that the proceedings in a military trial, certified by the President of the Court, were fatally defective because the signature of the Judge Advocate was not attached, and at the same time hold that the statement of the Reviewing Officer—*the judgment that sends a man to death or to a disgraced life*—may be added to the proceedings as a memorandum in the handwriting of a clerk, and that the signature of the officer pronouncing sentence is not necessary. This, of course, cannot be true—such a ruling would be contrary to the whole spirit and letter of the law, common and statutory, that controls trials by Court-Martial. The Judge Advocate General has accordingly, time and again, decided that the action of the Reviewing Officer should be subscribed by him personally.

The following are two of these decisions as given in the Official Digest of the decisions of the Judge Advocate General:

1st. "The authority exercised by a reviewing officer in taking "action upon the proceedings of a military court cannot be del- "egated by him to another. It is an authority, not merely exec- "utive, but *quasi* judicial in its nature, and it has been devolved "by law specifically upon that officer. His 'decision and orders,' "required by paragraph 896 of the Army Regulations, to be stated "at the end of the proceedings in each case, should be subscribed "by him personally."

2d. "*Held*, that the certificate of the reviewing officer, exhibit- "ing his approval or disapproval of a sentence, and action thereon, "should properly be authenticated by a signature written by himself, "and that to impress his name, as usually written, by means of a "*stamp*, was a practice not to be approved." (Digest Opinions

"Judge Advocate General, Title "Reviewing Officer," 2 and 3, "page 332.)

But aside from all authorities, the reasons supporting the opinion that the Reviewing Authority himself must make and sign the approval of a sentence that deprives an officer of his commission in the army, are within the reach of any mind and stronger than all the "precedents" that were ever marshaled in any case.

By the operation of law (65th Article of War) the *duty* of "confirming" a sentence of dismissal shifts from the President to the General and from the General back to the President again. This duty consists, according to the statutes governing the proceedings of Courts-Martial, the decisions of the legally appointed law officers of the army, and the practice in English Courts-Martial, 1st, In the Reviewing Officer (with the whole record of the trial before him) being satisfied that the court has discharged its duty in *strict* accordance with the law and that the punishment is not excessive; and 2d, In the Reviewing Officer endorsing on the record and signing an approval of the proceedings and the sentence.

The law that imposes this duty on the officers of the Government does not prescribe one form for the Reviewing Authority to follow when he chances to be a commissioned officer of the army, and another for the President when he acts as such. It says, "the officer having authority to confirm the sentence * * * shall state, at the end of the proceedings in each his decision and orders thereon." "Now, clearly, this law requires *all* Reviewing Officers to discharge this duty alike. What is legal and sufficient for one is legal and sufficient for all, and what is not a compliance with this law if performed by the General of the Army is not a compliance on the part of the President.

There is no word in the law, nor can any legitimate inference be drawn from any, by which the *character* of this duty changes. It passes unchanged from the President to the General and back again. Therefore, if it is not obligatory upon the President to discharge this duty as stated, then there is no legal authority for imposing it upon the General; and if the law requires it of the General, then the President must do it. But it is not denied that it is the duty of the General to discharge this duty in the manner indicated, and the War Department has never failed to require it of him.

Indeed it is admitted by all authorities, and has time and again

been decided by the highest law officers of the army, that when the commandant of a regiment or post, or the Department Commander or General of the army come to "confirm or disapprove" the action of a court-martial, no matter how trivial or grave the result may be, he must make this confirmation or disapproval in writing, over his own signature, on the record of the court. How then can it be asserted that the President when he comes to confirm or disapprove the terrible sentence of death or cashiering, is not bound to make and sign this sentence?

Now, as there is no law, judicial decision or legal principle, that exempts the President, when he passes upon a case that involves the honor or life of a soldier, from the necessity of discharging his duties in the same formal mode that must, according to the letter and spirit of the law, be followed in fixing all punishments; and as this duty rarely arises, and may with perfect ease be performed by him, it is difficult to understand what sufficient reason may be assigned to justify this new rule that the Bureau of Military Justice has been defending. In truth, it does not rest on any reason; it is simply suggested by a dull fancy that likens our Chief Executive, in the discharge of his high office, to the Chiefs who ruled before the people made the laws that *the ruler and people alike must obey.*

Certainly, all reasons that support the law and the decisions by which the duties of a Reviewing Officer are settled, do most peremptorily demand that prescribed forms should be more strictly followed by the officer who inflicts the greatest punishment known to any law, civil or military, than they are by him who adjudges the lightest punishment in camp or garrison; and, consequently, if the illegal act to which we object, has time and again been committed by other Secretaries of War, their acts do not justify the action of Secretary Belknap in this case; and, even should it be shown to be a "custom," still it would prove nothing except that more than one Secretary has assumed to do that which the law does not warrant him in doing.

But, assuming that all sentences of death and cashierments, from the foundation of our Government, have been confirmed by the Secretaries of War, does it follow that the law, which declares that the President must discharge this judicial function in person, and in a particular way, means that he need not do it in person, but may do it by deputy? This, of course, is an absurdity—no custom, no

matter how well founded in wisdom it may be, will justify an official in departing from the strict forms prescribed by the written law. But even if a custom could sanction such a departure, still we have no custom that has grown into a law in this country, that affects the honor or life of any man in the public service. Such law cannot exist with us, for the all-sufficient reason that our army is governed in all particulars by statute law. Indeed, there is no prerogative belonging to our Chief Executive that is based on immemorial usage. Our President does not rule in military or civil matters by a Divine right; his powers are all plainly written in the Constitution or in the statutes, and no doubts but that any practice of our Presidents, no matter how uniform it may be, is illegal if it violates the written law; and what we assert in this case is, that the *written law* is violated if a commission be taken from an officer except in pursuance of the sentence of a Court-Martial confirmed by the President under his sign-manual. This proposition cannot be answered by the statement that the illegal act complained of has been tolerated during two or three administrations, and is therefore legal—*i. e.*, that the statute has given way to a practice that is not even a custom.

There was a time in the history of our army when the statute gave the Commander-in-Chief the power to dismiss an officer peremptorily—*i. e.*, by order. This was an executive function, and he could, of course, exercise it by an order signed by any of his subordinate officers; but by the act of 1866 that power was taken out of his hands, and since that date he cannot deprive an officer of his commission except in pursuance of the 65th Article of War and the 896 paragraph of the Army Regulations.

But if this alleged practice was not a violation of the statute, it cannot be accepted as law by a civilized people, for an official would not, in good conscience, be justified in refusing to a soldier the same protection to his honor or his life that is allowed him on trials that, at the worst, can result only in an arrest or loss of pay. For such discrimination against the highest and most sacred of human rights would find no support from any recognized principle of law; and, no matter how ancient or uniform its precedents, it is condemned by the maxim which declares that "a custom introduced against reason ought rather to be called a usurpation than a custom;" and it would, therefore, fail to receive the approbation of any upright judge. Of such a practice Chief Justice Dallas says:

"If, when strictly examined, [a] practice proves to have crept in against principle, or is not pretended to depend upon any positive authority, I can only say I must decide upon principle, and if principle and practice are at variance, practice must give way; and * * if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere." (Raum's Legal Judgment, p. 125.)

Not only is this alleged practice of approving the sentence of dismissal under the hand of the Secretary of War a violation of both the letter and spirit of our statutes, the maxims of common law and good conscience, but it fails to find support in the English law or practice before military courts. Such a practice, doubtless, has no existence under any government founded on law excepting this; and here it is very young, having only of late years crept into our service without warrant of law or the sanction of principle.

Before the law, and before all upright men, the honor of a soldier is more precious than his life. In time of peace they are, by the English law, placed together in the keeping of the sovereign, and are guarded with more care against unmerited forfeiture, under the sentence of a military court, than is the life of an ordinary citizen in the civil courts. On the sentence of a civil court the liberty or life life of an Englishman may be forfeited to the law; but not so the honor or life of an English soldier on trial under the military law, for "the sentence of a General Court-Martial, unlike the sentence of a court of ordinary criminal jurisdiction, which is complete when pronounced, is inoperative until confirmed by the sovereign, or by an officer duly authorized, under the sign manual." (Simmon's Court-Martial, p. 358.)

If, then, the clear intent and meaning of the laws governing our army need the light of precedent for its elucidation, we can get it only from the English law and practice, and in that light the duty of the President in Court-Martial cases that deprive a soldier of honor or life, is perfectly plain. It is *to endorse his action in each case on the record of the court, and to sign it with his own hand.* It therefore follows that the second proposition in our brief, in this case, is *law*.

This being the law, there was no *judgment* against Major Runkle when he petitioned President Hayes to review the proceedings, findings and sentence in his case, and confirm or disapprove the action

of the court, as the law directs. The proceedings of the Court-Martial in his case were incomplete—they were waiting the action of the "proper Reviewing Authority;" and the accused had the legal right to demand, and it was the *official duty* of the President to make the review, and to enter up the final judgment. This he did, and this judgment of his, in the language of Attorney General Cushing, "like that of any other court in the last resort of law, *is final as to the subject matter.*"

But the Court of Claims sets forth the serious point made by Major Runkle touching matters pertaining to questions involving death and dishonor in the following words:

"The question is, whether this order it appears that *President* "Grant confirmed the sentence of the Court. The claimant con-"tends that it does not, and insists that the supposed confirmation "was merely the act of the Secretary, and not that of the President, "and so was no confirmation at all. It cannot be denied that this "raises a question of no ordinary significance in the administration "of military law; but we think it not of very great weight."

Here, then, we have a heavy article which does not weigh anything—a matter of extraordinary significance that does not amount to much, which, as opinions go, is doubtless logical.

"In the first place," says the Honorable Court, "it is important "to note that there is not nor ever was, any law requiring the Presi-"dent's confirmation of the sentence of a Court-Martial to be *at-"tested by his sign-manual.*"

Here we find the learned Court laying great stress on the absence of statute law as though nothing is required without it, and before the page is finished invoking custom with great confidence.

It is related that at the battle of Peach Tree Creek the Union soldiers fought first on one side of the breast works and then on the other, but they were fighting in a good cause—to save and not to destroy—for honor and not against it.

In reply it is submitted that without the *sign-manual* of the President no record of a Court-Martial is complete.

I. Because the *Sign-manual* of the President is required to confer the honor of a Commission upon a citizen, and it stands to reason that the disgrace of a deprivation of that Commission should not be inflicted upon him with any less formality.

II. Because, if there be no Statute, custom should govern, and it has been largely the customs of Presidents to affix the Sign-manual, and the five exceptions cited by the Court of Claims cannot

make weight against a reasonable custom, for even if these illegal were tolerated, that does not make the action in this case legal.

But let us examine these cases more closely, comparing the words used with those used by Secretary Belknap.

1. Case of Lieut. Wm. L. Colquhoun; the words used by Secretary Eaton were:

"*By command of the President.*"

No such words appear upon the record in this case.

2. Case of Major George B. Crittenden—Secretary Marcey used these words:

"The President approves of the proceedings and sentence in the "case of Major Crittenden, and directs the proper order to be issued "thereon."

The record shows no such statement by Secretary Belknap.

3. It is stated that in the cases of Brevt. Lieut. Col. Montgomery and Lieut. Perkins, the determination of the President was in like manner signified, i. e., as in the case of Major Crittenden. Such may have been the case, but the determination of the President was not in *like manner* signified in the case of Major Runkle.

4. This leaves the case of Lieut. Cochrane, the action in which, if the words quoted by the Atty. Genl. and court (The proceeding and sentence of the court are approved" over the signature of the Secty.) are all, was simply no approval at all.

III. Because where there is no Statute law, nor settled custom having the force of law in our service, the English practice, from which we took our Military System, should govern, and by the English Law it is held that the sentence of a Court-Martial, unlike the sentence of a court of ordinary criminal jurisdiction, which is complete when pronounced, is inoperative until confirmed by the Sovereign or by an officer clearly authorized *by the Sign-manual of the Sovereign.* (Simmons on Courts-Martial, 358.)

IV. Because the 65th, 106th, and 108th of the Articles of War in force when Major Runkle was tried, provided:

Art. 65. "Neither shall any sentence of a Court-Martial, in time of peace, extending to the loss of life or the dismission of a commissioned officer, or which shall either in time of peace or war respect a general officer, be carried into execution until after the *whole proceedings* shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval and orders in the case."

Art. 106. "In time of peace, no sentence of a Court-Martial directing the dismissal of an officer, *shall be carried into execution until it shall have been confirmed by the President.*"

Art. 108. "No sentence of a Court-Martial, either in time of peace or war, respecting a general officer, *shall be carried into execution until it shall have been confirmed by the President.*"

But Article No. 105 also in force as the date of trial provided:

Art. 105. "No sentence of a Court-Martial inflicting the punishment of death *shall be carried into execution until it shall have been confirmed by the President.*"

It will be observed, and it is "important to note" that *precisely the same language* is used in each one of these Articles. Certainly no one will claim that the President is not required to affix his *Sign-manual* to a sentence of death, and it follows, naturally, therefore, that he must personally approve a sentence of dismissal, and *witness the same by his Sign-manual*, for it is indeed a living death, and death and dismissal are linked together continually in the Acts of Congress. As witness the following:

"Every officer who is authorized to order a general Court-Martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or dismissal of an officer." Old Article 89.

(Act July, 1862, C, 201, S, 7. V. 12)

To repeat, a pardon is not valid without the Sign-manual. How then shall a dismissal be valid without it, seeing that they are thus linked together?

In the next place the Court of Claims in discussing the relations existing between the President and the Secretary of War, lays stress on the decision of the Supreme Court of the United States in the case of Wilcox vs. Jackson. (15 Pet. 498.)

The decision avers that: "The President speaks and acts "through the heads of the several departments in relation *to sub-*"*jects which appertain to their respective duties.*"

Uudoubtedly, "in relation to subjects which *appertain to their* [the Heads of the several departments] *respective duties.*" But it is "important to note" that the Secretary of War is no part of a general Court-Martial, dealing with questions of dishonor or death. *The President is the vital part.* For he is acting as a judicial officer, as a part, and the most important part of the court. The ap-

proval is not one of the duties of the Secretary of War; it is the *special specific duty of the President*, and he must "act and speak" for himself, and witness with his own signature, what he does and says.

The reservation of lands from sale under the Act of Congress is an executive act, and may, as the Supreme Court holds, "be in "legal effect a reservation, made by order of the President," and yet hardly so, it is submitted, unless the record, clearly and plainly, shows on its face that the act is done "*by order of the President.*" But where the President is acting in a purely judicial capacity, as a part, and the chief part of a Court taking the final action, which gives life to all that goes before, then, as in the case of reprieves and pardons, he alone can act, and the *Sign-manual* must witness the act.

In regard to the case of the United States vs. Eliason (16 Pet. 291) reference is made to the argument of Senator Carpenter, Page — of this Argument.

As says Attorney General Cushing:

"But if the direction ot the President to the Executive Departments be assumed generally, or at least in the general statutes of organizations may there not be still cases of distinction in which, by the Constitution or by statute, specific things must be done by the President himself or by the heads of Departments? Such cases do undoubtedly exist, and any view of the subject which omits to consider them, must be impartial, defective, imperfect.

"We begin with examples of acts performable by the President, as prescribed by the Constitution."

"Thus, it may be presumed, that he, the man discharging the Presidential office, and he alone, grants reprieves and pardons for offences against the United States, not another man, the Attorney General or anybody else, by delegation of the President." (Opin. Vol VII, p. 464.)

Let it not be forgotten here that Congress used precisely the same words in regard to sentences of death and in regard to dismissals.

But admitting that, which we in no wise do admit, viz:

That *President Grant* did verbally approve the findings and sentence, such fact does not and never did appear in any record in the Executive office. *President Grant* left behind him no record that the proceedings in the case of Major Runkle had been laid be-

fore him and had by him been acted upon, but *there was a full record of his action in the case of Lieutenant John L. Graham, the only other person tried by that Court.* Of this fact *President Hayes* took notice, and it is trusted that the Supreme Court can take notice thereof.

Upon the point that the record of the Court-Martial must show clearly upon its face an approval by the President, and that the record does not so show, the following argument of the Hon. Matt. H. Carpenter is respectfully submitted—an argument given without fee, because he believed upon examination, that Maior Runkle had been unjustly and illegally dealt with:

OPINION.

"The question is whether this was a valid approval of the proceedings, findings and sentence of the Court to the extent of dismissing Major Runkle from the service.

The Attorney General, in the opinion before me, holds that the approval, to be of any validity, must be the approval of the President and not of the Secretary of War. Therefore the question is reduced to this: is this endorsement, signed by the Secretary of War, sufficient evidence that the *President* approved the proceedings and sentence to the extent aforesaid?

It is clear that the endorsement does not *show* the fact that the record was ever laid before the President, *or that he ever approved of any part of the sentence.* But in the opinion before me, it is held that, from the fact that it is stated, that the President was pleased to remit a part of the sentence, it must be *presumed* that he examined the case and approved the part of the sentence which is said in the endorsement *to be approved*, though not said to be approved by the President.

This is the point at at which I think the opinion departs from sound doctrine, and following a class of cases having no application to Major Runkle's case, reaches an erroneous conclusion.

It frequently happens, the same person fills different offices, some judicial and others political. Justices of the peace in England, exercise certain judicial functions, and at the same time are clothed with powers pertaining to political administration. In making orders and appointments not involving judicial powers, the same presumptions arise in favor of the regularity of their proceedings as would be indulged in in favor of the same proceedings by the Lord

Chancellor or Chief Justices of England. the same that are available to support the proceeding of a court of general jurisdiction. But in a case where the proceedings involve an exercise of judicial power, no such presumption arises; and being courts of limited jurisdiction, *the record must show affirmatively* every fact necessary to jurisdiction, and also show regularity of proceedings in the exercise of the jurisdiction, otherwise the proceedings are void, not voidable for error, *but void.*

In Rex *vs.* Morris, 4 T. R., 552, Lord Kenyon said:

"This court has *invariably* made a distinction between *orders* of "justices and convictions, and said that everything is to be intended "in favor of the *former.*"

The decision, United States *vs.* Eliason, 16, Pet., 402, and Wilcox *vs.* Jackson, 13 Pet., 513, were made in cases, not of the exercise of *judicial,* but merely of *political* power; and fall clearly within the distinction stated by Lord Kenyon. They were cases when everything was presumed in favor of the performance of official duty; and for that reason, those decisions have no application to this case.

If anything may be said to be well settled, and too firmly established by adjudication, to be departed from, it is the proposition that Courts-Martial are courts of limited and special jurisdiction, and it is essential to their validity that it should be affirmatively shown that they acted upon a case clearly within their jurisdiction, and that their proceedings were strictly regular. No presumption can be indulged in favor of the validity of the judgment of such a court, and its judgement is everywhere treated as a *nullity,* unless the record affirmatively shows both jurisdiction and regularity of proceeding.

Greenleaf's Ev., 3 vol., sec. 470.
Duffield *vs.* Smith and others, 3 Serg. & Rawle 589.
Brooks *vs.* Adams, 11 Pick., 440.
Mills *vs.* Martin, 11 Johns., 7.
Brooks *vs.* Davis, 17 Johns., 148.
Jones *vs.* Crawford, 1 Johns. Case, p. 20, and cases cited.
Opinion of Attorney General Rush, Opins., vol. 1, p. 177.
Sheldon *vs.* Sill, 4 How., 441.
State *vs.* Gachenbamier, 30 Ind., 150.
Ohio, &c., R. R. Co. *vs.* Schultz, 31 Ind., 150.
State *vs.* Ely, 43 Ala., 568.

The President in reviewing the proceedings of Courts-Martial, is not exercising an executive function devolved upon him by the Constitution, as to which the orders of cabinet officers are to be regarded as his orders. The Constitution, authorizes Congress "to "make rules for the government and regulation of the land and "naval forces." And Congress has prescribed the machinery and regulated the proceedings for the trial of officers charged with offenses against military order and discipline.

In cases like this, the officers detailed on the Court-Martial perform duties similar to those of masters in chancery in suits in equity. They take the evidence and report their opinions thereon in the form of findings and sentence. But, as in case of the report of a master in chancery, no legal consequence follows, unless their proceedings findings and sentence are approved by the President. The President is substantially a member of every Court-Martial where the sentence extends to death or cashierment, and his approval or disapproval is a part of the proceedings of every such Court-Martial, and the vital part indeed, because all else is without effect upon the officer tried, until the President has made his approval. From this it results that no *presumptions* that he did his duty are to be indulged, more than would be to uphold the proceedings of the court in any other stage of such proceedings.

The 65th Article of War, in force when this Court-Martial sat, provides that no sentence of a Court-Martial in time of peace, extending to the dismissal of a commissioned officer, shall be carried into execution, "until after the whole proceedings shall have been "transmitted to the Secretary of War, to be laid before the President of the United States, for *his* confirmation or disapproval, and orders "in the case."

A commissioned officer in the army is nominated by the President, confirmed by the Senate, and appointed and commissioned by the President. All this is a matter of record. And before he can be excluded from his office there must be a record showing affirmatively every step required by law for this purpose. It is not enough to show a *sentence* of a Court-Martial. All its proceedings, from the organization of the court to the last act it performed, must be shown, and the regularity of the proceedings in every particular must be shown—shown affirmatively; and cannot be helped out by presumptions in favor of the proceedings. And, after that, the

record must show that *all* the proceedings were laid before the President, and that the same, so far as relied on to oust the officer, were *confirmed* by the President.

It is too clear for discussion that this record does not show, nor pretend to show, or recite, that all the proceedings were laid before the President, and that he confirmed the sentence to the extent of dismissing Major Runkle from the service.

It may have been that the President decided that a portion of the sentence, the fine and imprisonment, should not be executed, and reserved his opinion as to the other parts of the sentence. This record does not show he did not so reserve his opinion, unless the contrary is to be *presumed*. But in this case nothing can be presumed. Everything must be *shown*. Suppose the court had not sentenced Major Runkle to be dismissed, but the President had endorsed the papers reciting such a sentence and his confirmation thereof, and ordered him to be dismissed, it would not be contended that the sentence of the court could be *presumed* from the confirmation by the President. No more can it be presumed that, although there were such a sentence, the President, by an exercise of his own judgment, approved and confirmed the same.

This being the condition of the record in Major Runkle's case when President Hayes was inaugurated, I have no doubt of his power to take up the case and approve or disapprove of the sentence, so far at least, as no recital even showed that President Grant had passed upon the case. I think the endorsement altogether void; but certainly so far as it does not pretend to show that the President acted, it was proper for President Hayes to act.

It is said in the opinion before me, other officers have been dismissed by similar proceedings. That may be. But Major Runkle was not a party to those proceedings and is neither bound nor estopped by them. To hold that an erroneous practice in the departments, can overrule the law, would be to hold that not Congress, but the departments, can make the law.

MATT. H. CARPENTER,
Counsellor at Law."

The Court of Claims finally makes up and decides a question which is stated as follows:

"Proceeding upon the assumption that W. W. Belknap, Secre-
"tary of War, approved the proceedings of said Court, and there-
"upon caused general order, No. 7, Series of 1873, to issue from

"the War Department, President Hayes, as appears in his order, "caused the record to be laid before himself, and, having carefully "considered the same was of opinion [not that the Court was with- "out jurisdiction to try the Appellant] but *that the said conviction is "not sustained by the evidence in the case*, and thereupon disap- "proved the conviction and sentence, and revoked general order, "No. 7.

"Was this a lawful exercise of the executive power vested in him "as President of the United States? We are clear in the conclu- "sion that it was not."

He was not exercising "executive" but judicicial power.

Now it is respectively submitted that *President Hayes* was the sole judge as to whether or not the case of Major Runkle was open and awaiting action; that in the order of President Hayes, and in that order alone, appears the fact that the proceedings of the Court-Martial had *been laid before a President* of *the United States* and that *a President had acted upon the same*, and no power can go behind this action of the President save Congress, acting under the power of impeachment. The Sign-manual of the President of the United States is affixed to that order and it is binding and final.

True, the President did not say anything about the jurisdiction of the Court, but did say what was sufficient and of far more and of vital importance to Major Runkle, the *conviction is not sustained by the evidence in the case*. That certificate and signature are of greater weight, legally and moraly, than the one appended to general order No. 7, 1873, "*W. W. Belknap, Secretary of War.*"

The reasoning of the Court under this head is not relevant to the case. No one ever claimed or pretended to claim that *President Hayes* could revoke an order lawfully issued to carry into effect a sentence "*formally approved by the proper Reviewing Authority*" but that he could review the case *coming before a President for the first time* and issue the necessary lawful orders.

If President Grant had acted in the case as the law directed, why did he cause the case to be opened up and Reports to be made by the Judge Advocate General?

"When the act was once done, says the Court, the *naked* power was exhausted." Exactly! *President Hayes, and he only did the act* and it is final.

The example cited (approval of Acts of Congress) is not to the point. It is submitted that if a Secretary of War should assume to approve and sign an act of Congress, a subsequent President might

set aside every order issued thereunder. And if it be found that an officer has been illegally dismissed, and in a case wherein *the evidence did not sustain the findings*, that officer ought to be restored if any way can be found to restore him.

As to the statement that the retired list was full at the date of President Hayes' order, the fact in nowise concerns Major Runkle. If he was not lawfully dismissed he was not out of the army nor legally off the list. The placing of another officer's name on the list does not affect Major Runkle's rights.

We desire in the next place, if the Court please, to invite attention to the illegal and tyranical interference of the War Department with the Court-Martial—interference which made of the trial a mockery.

In July, 1872, while attending the trial of Lieutenant John L. Graham, by Court-Martial, at Louisville, Kentucky, in obedience to a supœna of the court served on Major Runkle at Kenton, Ohio, he was arrested and brought to trial before the same Court-Martial; the order of arrest was preceded by a letter dated Washington, July 1st, 1872, from General E. D. Townsend, Adjutant General United States Army, to Captain E. W. Smith, Judge Advocate, transmitting, by direction of the Secretary of War, charges against Major Runkle, and directing Captain Smith to bring him to trial, and informing him that the order for Major Runkle's arrest will be issued.

See manuscript Record of trial.

This arrest was made verbally, as is the custom, and by it Major Runkle was furnished with a copy of the charges and specifications against him, and ordered to confine himself to the limits of the city of Louisville, thus preventing him from referring to his private papers in other localities, and preparing to meet these charges so suddenly brought against him.

Upon July 27th, 1872, a few days after his arrest, Major Runkle appeared before the court, and filed the following written request to be allowed four months' time to prepare his defense:

The accused giving notice that he is prepared to plead to the jurisdiction of the court, nevertheless not knowing what may be the action of the court on that plea, now without waiving that plea, applies to the court for postponement of trial. He says on oath that without from four to five months for the investigation of the facts which he is advised and believes it will probably be necessary to prove, in order to present his defense to said charges and specifications if the same shall seem to the court within their jurisdiction, it will be impossible for him to present properly for his defense, and that without such investigation the trial of said charges and specifications must necessarily work great injustice to him, the accused.

He states that he was brought to Louisville as a witness for the Government against Lieutenant John L. Graham, and that while in attendance as such witness he was, as he claims in error as to authority, placed under arrest, within the limits of the city of Louisville, and served with a copy of the charges and specifications, on which it is now proposed to try him in this court.

He further states that the reading of said charges and specifications conveyed to him the first intimation of any kind, that he was to be subjected to accusations as in said charges and specifications shown, so far as the cases in said specifications mentioned are concerned, and that before seeing said specifications he neither knew nor suspected, nor had any reason to suspect, that he would be accused as in said specifications shown, but whatever rumors he had heard or otherwise learned about, had pointed to quite other matters, so that on reading the said specifications the accused was put to the endeavor to recollect the facts which it might be necessary to prove in order to make a proper defense. * * * * The accused took into consideration what would be required by a preparation of his defense * * * and now states to the court, and most respectfully insists, that to proceed at this time to the trial of said charges and specifications would be most unjust to him. * * * He represents to the court that since the time of his arrest, which was only a few days ago, it has not been practicable for him to make the proper application for a postponement to the authority convening the court.

He further states that the facts, the proving of which will, as aforesaid probably be essential to his defense belong to official transactions of great number and variety extending over a great space of time and transacted at various places in the State of Kentucky, that the said facts were transactions of the Freedman's Bureau in the State of Kentucky during the connection of the accused, such as it was, with said Bureau, and were transacted and *performed by many persons, one of whom is dead and others have changed their places of residence, going to places now unknown to affiant; that* the difficulty of the investigation * * * in order to a proper defense and a fair trial is the greater because it has not been the pleasure of the Government to furnish the accused a list of the witnesses or an

indication of the other instruments of evidence to be used against him, but that in any case the accused would still have had to investigate or cause to be investigated a large number of various transactions as to which his memory is necessarily imperfect, as far as they were personally known to him, and as to *some of which he never had any personal knowledge whatever.* He states further that all the papers, documents, and books used in and about the operations and transactions of the said Freedman's Bureau in the State of Kentucky while accused was connected with it, except the check stubs and perhaps some unimportant memoranda, have been long out of affiant's possession and beyond his reach. He also states that the arrest aforesaid directs his confinement within the limits of the city of Louisville, and the said confinement necessarily renders very difficult the investigation aforesaid, much of which would require his presence at Washington, D. C., and much of which would require his presence at Covington, in this State.

Finally, he says that this application is not made for delay merely, but for substantial justice, and respectfully asks for a postponement of four months, as aforesaid.

BEN. P. RUNKLE.

Sworn to before G. W. Smith, Judge Advocate.

See orginal with MS. Record.

August 1st. The court adopted the order that the court proceed to the trial of the accused and continue it until all the witnesses now in attendance, and those summoned who may be in attendance prior to the continuation contemplated in this motion have been examined; and that the accused be informed; that when the examination of these witnesses has been concluded the court will then grant the continuation until *Thursday, September* 19, 1872.

2d. This action of the court to be reported at once to the Adjutant General of the Army with the information that a telegram will be sent informing him when the examination of the witnesses has been concluded.

See MS. Record.

The case was immediately proceeded with, and Major Runkle forced to commence the trial without any opportunity for preparation whatever, and called upon to cross-examine the witnesses for the prosecution without being given any time to learn the means in his power of defense against and contradiction of their testimony and by *this deprived of a fair cross-examination.*

On August 7th the Judge Advocate announced to the court that all the witnesses authorized to be examined under the order adopted by the court on August 1st had been examined. The court made the following order:

"That the Judge Advocate be instructed to telegraph to the Adjutant General that the witnesses authorized to be examined under the order of the court of the 1st inst., in the case of Major Runkle, have been examined; that the case of Lieutenant Graham will probably be concluded to-morrow, (Thursday,) and the court desires to be informed if the members shall return to their posts on the conclusion of Graham case."

See MS. Record of Trial, page 170.

In reply the court received the following telegram:

WASHINGTON, D. C., August 8, 1872.

CAPT. E. W. SMITH,

Eighteenth Infantry, Judge Advocate, Louisville, Ky.

The Secretary of War directs that the court in Major Runkle's case do not adjourn except from day to day. If it has adjourned until September he directs that it reconvene, and adjourn from day to day, until witnesses appear. No extension of Major Runkle's limits will be authorized.

E. D. TOWNSEND,
Adjutant General.

See Exhibit No. 15, MS. Record.

Upon the receipt of this telegram the court directed that the trial of Major Runkle be resumed at 12 M., August 9, 1872.

Thus another gross hardship and injustice was done to Major Runkle. He had been tolled into coming to the city of Louisville by a subpœna of this very Court-Martial, which subpœna he could (being a retired officer of the United State Army) have disregarded with impunity, but which he hastened to obey, feeling that he had no cause to hesitate in appearing before any court, civil or military. Arrested while a witness under the process, and, therefore, under the protection of this court, he is brought before it as a prisoner.

In a civil court such an action would be impossible, and even in a military court, (which is supposed to follow the rules of law,) and is composed of officers made for the time being, judges of what is conduct becoming "an officer and a gentleman," it has a strong appearance of an attempt at kidnapping.

Major Runkle was inveigled (and I use the word advisedly) into Kentucky as a witness, and while attending as such witness was arrested and held in durance within the corporate limits of the city of Louisville. This the supposed Reviewing Authority was pleased to term an "irregularity." I am well aware that the so-called legal process, incident to courts-martial, is arbitrary, despotic, and gen-

erally regardless of either precedent or law; but I am not prepared to accept a high-handed outrage, such as the entire Government was organized to prevent, being considered a "mere irregularity." The court could just as well have hung Major Runkle and tried him afterwards, as thus violate the simplest principle underlying all the rights of the citizen.

It has been asserted that because the supposed Reviewing Authority moved to clemency remitted the smaller portion of the punishment, therefore the sufferer should be content.

It is Æsop who tells of a wolf that offered untold wealth to a crane if he would insert his head in the wolf's maw and remove a bone that was choking him to death. Afterwards, when the poor crane asked for his reward for this surgical operation, the wolf said he ought to be satisfied with having escaped with his head after trusting it in the mouth of the afflicted patient. This is the only precedent that I know of that sustains this conclusion. The further fact, however, remains that Major Runkle was not put under arrest for the reason actuating courts in such cases, that the individual charged with crime may not escape, for he is only confined to the limits of the city of Louisville, proving thereby that the Secretary of War was actuated by some other motive than a desire to retain him in the custody of the Department.

Arrested and brought to trial in this manner, charged with criminal irregularities in the management of his accounts, Major Runkle, to this sudden and unexpected charge, requested the indulgence of a reasonable time to prepare his defense—a privilege granted the lowest of criminals. His duties, as the record has already shown, has been of the most arduous and complicated character; he had been virtually in control of the payments of all the bounties to colored people of Kentucky from 1867 to 1871, and his accounts must have been immense in bulk; he had been for more than a year separated from the Freedman's Bureau, and, of course, had no occasion during that time to keep himself well informed of all the business which had been transacted by him while he held the position under it. His memory, therefore, needed refreshing. In addition to all this, and what was the most severe upon Major Runkle, he was not only suddenly arrested, but was immediately confined to the limits of the city of Louisville, and thus debarred from visiting the localities of his alleged malpractices and there procuring evi-

dence for his defense, and also from examining the official records of his branch of the Bureau in Washington, D. C., and from these records procuring the means to prove his innocence. Confined to the limits of Louisville, he was compelled from day to day to give his attendance on and undivided attention to the progress of the trial; and when the court, in its discretion, had determined to grant Major Runkle not the time he requested, but a very limited portion of it, it is ordered by its superior officer to proceed at once and continuously with the case.

The severity of this order is so apparent to a just and equitable mind that further comment is unnecessary.

Twelve days after this dispatch, during which time the trial had been assiduously urged forward by the prosecution, on August 20th, the following telegram was read to the court:

"WASHINGTON, D. C.,——— 15, 1872.

["Received at 3:17 p. m., August 15th.]

"To Captain E. W. SMITH, J. A.,

Headquarters Dep't South, Louisville, Ky:

"The Secretary of War, by his order August 8th, did not intend to forbid continuance in Major Runkle's case until September 19th. He now has hereby authorized an adjournment of the court, if it deems proper, from 20th instant until Thursday, September 19th; members to return to their posts accordingly.

"THOMAS M. VINCENT,
"*Assistant Adjutant General.*

"66 p'd, Gov't rate."

See MS. Record of trial, page 256.

Upon the reading of this telegram, the court adjourned to meet September 19, 1872.

From the first of August Major Runkle had been in close and continuous attention upon the court, his time and attendance necessarily fully engaged with its proceedings, having been debarred from preparing himself to fairly and understandingly meet his accusers; and now, on the 20th of August, the Court-Martial adjourns, leaving him confined by orders to the limits of the city of Louisville, and with only twenty-eight days to prepare a defense, the preparations of which he had stated to the court in his application under oath would require at least four months of unrestrained liberty, with the privilege of examining thousands of papers, realizing the utter impossibility of making adequate preparation for defense to these

charges and specifications, based upon some fourteen alleged criminal irregularities taken from an immense record of years, unless he was allowed his freedom, Major Runkle, through his counsel, at once applied for an extension of his limits, but, receiving no response, he, through counsel, on the eighth day after the court adjourned, addressed the following letter to the Secretary of War:

LOUISVILLE, KY. August 28, 1872.

HON. W. W. BELKNAP,

Secretary of War, Washington, D. C.

In the trial of Major Ben. P. Runkle, United States Army (retired) before a General Court-Martial at this place, it is known to you that accused asked *four months'* time to prepare his defense, and an adjournment for this purpose, which request was overruled by the court; but an order made by them finally, with your permission, that an adjournment be had from August 20th to September 19th. The adjournment asked by accused was in good faith and for no other purpose than to enable him to prepare his defense. All the records of the Bureau being in the hands of the War Department, and the parties who made the divers and sundry payments, as his subordinates, scattered through the country, and their whereabouts to him unknown in many cases, as well as the whereabouts of many of his witnesses also unknown, and it being essential to his defense that he find these parties, and also have an opportunity to examine the Bureau records.

When the adjournment was made to September 19th, Major Runkle and his counsel applied at once for a release from his arrest, that he might himself have an opportunity to examine the records in Washington. Also, that he might go to his home in Ohio, and there hunt up some papers which he believes no other person can find, and which are of vital importance to his defense. It was supposed by Major Runkle and his counsel that the adjournment to September 19th was made with your approval to enable Major Runkle to prepare his defense, and that during this recess he would be released from arrest, *or that his limits would be extended*, so as to enable him to go where he deemed it necessary to prepare his defense; and an application was at once made to General Terry, and, as we learn, by him sent you, (he, General Terry, acting only through your orders.) This request has not to this date been granted; and we now, as his counsel, very respectfully but earnestly ask that you grant this to him at once. Without it (the extension of his limits) the recess is not and cannot be of any service to him, and we know enough of the case to say that he cannot properly make his defense.

The accused, through his counsel, asks only what he with them regards an act of justice. Certainly, a reasonable opportunity to

prepare a defense has never, in this country, been denied the meanest criminal, and we believe your not acting on the request at once and favorable is because you have not understood the facts.

Please reply to this at your earliest convenient moment, and if request is granted send order to Major Runkle here by telegraph.

Very respectfully,

SAM McKEE,
Counsel for Major Ben. P. Runkle.

COVINGTON, KY., August 30th, 1872.

I concur in the above, adding that already has so much time been lost that I beg leave respectfully to urge instant action, if that action can be favorable.

Respectfully,

ROBERT WARDEN,
Of Counsel for Accused.

(See Records of War Department)

To which this answer was returned:

WAR DEPARTMENT, A. G. O.,
September 4th, 1872.

MESSRS. SAM. McKEE and ROB'T. WARDEN,
(*Of council for Maj. Ben. P. Runkle, U. S. A., retired,*) 157
West Jefferson street, Louisville, Ky.

GENTLEMEN: Referring to your communication of the 28th ult., (concurrence of Mr. Warden, dated 30th ult.,) received the 2d inst., asking for the release from arrest of Major Ben. P. Runkle, U. S. A., (retired,) to enable him to visit Washington, D. C., and other places, on busi ess connected with his defence, you are respectfully informed that the request has not been favorably considered by the Secretary of War.

Very respectfully, your obd't serv't.

W. D. WHIPPLE,
Assistant Adjutant General.

If aught were wanting to show the unnecessary, cruel, and unfair manner in which Major Runkle was treated during the prosecution of tl is case, and the uncalled for severity by which he was deprived of the means which he might have to defend himself, the telegrams and letters from the headquarters at Washington would plainly demonstrate it. What possible objection could there be to granting Major Runkle's request, made through his counsel? He was not actually imprisoned, and, if allowed any liberty, might possibly es-

cape; he was confined only by his voluntary obedience to the order of arrest, and could as easily, if so inclined, have escaped from Louisville as he could from Washington, Covington, or any of the localities he desired permission to visit, for the reasons given, which reasons dignified his request to a demand of a right. This refusal amounted to an act of cruel injustice.

Feeling the imperative necessity of the case Major Runkle's counsel, immediately on the receipt of this answer, addressed the following letter to the Secretary of War, determined to let the responsibility of this mode of trying a gallant officer rest where it might properly belong:

LOUISVILLE, KENTUCKY, Sept., 7, 1872.

Hon. W. W. BELKNAP,

Secretary of War, Washington, D. C.:

Referring to your letter 4th instant in regard to request of Major Runkle, undergoing trial by Court-Martial here, you appear to have misapprehended his and our request. It was not that he be released from arrest, but his request was "*that he be allowed an extension of limits*, and *to proceed to Washington, D. C.*, and *other places for the purpose of examining records, &c.*," in order to enable him to prepare his defense. Certainly, when he and his counsel join in the opinion that he cannot, in justice to himself, prepare his defense without this, it ought to be granted.

Very Respectfully,

SAM MCKEE,
Of Counsel for Major Runkle.

And received this reply:

September 11, 1872.

SAM MCKEE,

157 West Jefferson Street, Louisville:

Orders sent commanding Gen'l Dept. of South to extend Runkle's limits. Call on him for copy of telegraphic orders.

WM. W. BELKNAP,
Secretary of War.

Official.

[Telegram.]

WAR DEPARTMENT,
A. G. O., WASHINGTON, D. C., Sept. 11, 1872.

Commanding General, Department of the South,
Louisville, Ky.

By direction of the Secretary of War.

Limits of Major Ben. P. Runkle hereby extended to enable him to visit certain places, thus to aid preparation of defense.

He cannot examine records of War Department as requested. Said records can be produced on proper call before the Court-Martial.*

Extension limits will expire nine o'clock p. m., September 18th.

Furnish him copy of this, through Samuel McKee, of counsel.

THOMAS M. VINCENT,
Ass't Adj't Gen'l.

For these letters and telegrams see files of War Department, under the care of General T. M. Vincent.

The extension of limits directed by this telegram was granted to Major Runkle, on the day following, which was September 12, and by it he was granted until 12 m., September 18th, five days and a half of liberty to travel hundreds of miles, and examine files of papers which were the accumulations of years; to "leisurely" (?) reflect and call to mind what papers and what witnesses he might desire. Truly a most gracious permission, was it not? I submit this to the Court; but, lest this great concession should be taken as granting too much, I pray you note the care which is taken to expressly state that Major Runkle cannot examine the *public* records in Washington, D. C.

This action of the Government was the very refinement of cuelty and injustice to the accused. He was called upon suddenly to stand his trial a few days after an unexpected arrest, a trial which to him involved what was far dearer than life, his honor, and reputation won by gallantry on the field of battle and maintained through years of public service; the means of proving his innocence placed beyond his reach, he is called upon to plunge at once into the controversy involving these vital issues, and asks in response merely an opportunity for preparation in order that he may have what the laws of his country declare is the right of the lowest, "a fair trial." The Record shows he asked for the space of four months with the privilege of visiting different localities. Was this an unreasonable request? I ask in view of the immense amount of research which the case called for, as shown by the Record, from which I have quoted, was it unreasonable? It was stated by the defendant, under oath, that it was necessary to him, and we are not dealing with the case of an ordinary, common criminal, but the accused who made this request was an officer of the United States, holding the high rank of major in its service. Was it unreasonable?

*N. B.—This permission was granted General O. O. Howard by the court that tried him.

What does he receive in reply, a present refusal by the court, and when this body would grant him a pittance of the time, orders from superior officers deny him the right, and at last by persistent importunity he gains what—five days and a half.

Since Major Runkle's trial, in the fall and winter of 1875 and 1876, and after he had submitted his petition, to have his case revised, to President Grant, permission to examine the records of the War Department was accorded him, and the evidence that he acted in his transactions in obedience to the orders and in accordance with the established usages and customs of the Bureau, that he was guiltless of the charge of embezzlement, and if there was any blame for the manner in which the Bureau business had been conducted, it did not rest with him—was produced and the result was the legal and proper recognition of his status as an officer by President Hayes.

This closes the case of the Appellant. It is probably dwelt upon more at length than the accustomed practice in briefs allows, but not more than the rights of citizens involved in this contention call for. The late war that so suddenly burst upon us, unaccustomed as we were to that condition does not seem to have ended in the field, where it rightfully belonged, with the cessation of violence that came of the surrender of the enemy, but has continued its so called legal practices in our time of peace. That which was use in the hour of peril is abuse of the most alarming sort in a time of peace. The careless indifference to life in time of war is now after the war is ended an indifference to right, and we are confronted with the proposition that all we sought to maintain by arms was lost in the attempt at such maintenance.

That which justified a war tribunal during war a high court has now held also justifies a violation of the few laws recognized as controlling a Court-Martial and limiting its power. From this decision we confidently appeal.

DONN PIATT,
Of Counsel for Appellant.

122-543

FILED
APR 22 1887
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 259.

BENJAMIN P. RUNKLE, APPELLANT,

vs.

THE UNITED STATES.

No. 260.

THE UNITED STATES, APPELLANT,

vs.

BENJAMIN P. RUNKLE.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLANT, BENJAMIN P. RUNKLE.

M. F. MORRIS,
For Appellant Runkle.

JUDD & DETWEILER, PRINTERS.

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This closes the case of the Appellant. It is probably dwelt upon more at length than the accustomed practice in briefs allows, but not more than the rights of citizens involved in this contention call for. The late war that so suddenly burst upon us, unaccustomed as we were to that condition does not seem to have ended in the field, where it rightfully belonged, with the cessation of violence that came of the surrender of the enemy, but has continued its so called legal practices in our time of peace. That which was use in the hour of peril is abuse of the most alarming sort in a time of peace. The careless indifference to life in time of war is now after the war is ended an indifference to right, and we are confronted with the proposition that all we sought to maintain by arms was lost in the attempt at such maintenance.

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APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLANT, BENJAMIN P. RUNKLE.

The appellant, Benjamin P. Runkle, became an officer in the military service of the United States on April 22, 1861, as a captain of the Thirteenth Regiment of Ohio Infantry. During the war he received several promotions, and was several times honorably mustered out of the service, as often re-entering it under new appointments. On October 6, 1866, he received a commission in the regular army as major in

the Forty-fifth Infantry; was assigned, on April 11, 1867, to the position of disbursing officer of the Freedman's Bureau in the State of Kentucky, and was placed on the retired list of the army on December 15th, 1870, but continued, under his previous assignment, to act as disbursing officer of the Freedman's Bureau in Kentucky until August, 1872, when he was arrested while attending as a witness before a general court-martial convened, by order of the President of the United States, at Louisville, in the State of Kentucky. He was arraigned before this court and tried on two several charges—1st, Violation of the first section of the act of Congress of March 2, 1863, chap. 67 (10 Stat., p. 696), which was an act to punish frauds upon the Government of the United States, and, 2d, Conduct unbecoming an officer and a gentleman.

There were thirteen specifications under the first charge and fourteen under the second. The specifications, however, were substantially the same in both charges, all of them being based upon alleged malfeasance in office—the failure to pay over money intrusted to him for payment and the conversion of such money to his own use.

Of these specifications the first and fifth under charge I, and the first, fifth, and fourteenth under charge II, averred acts of malfeasance alleged to have been committed in the year 1870, before the accused was placed on the retired list. All the other specifications averred acts alleged to have been committed in 1871, after the retirement. Of five of the specifications under charge I he was found guilty, of one not guilty, and of the remaining seven he was found guilty, except as to the misappropriation of the funds to his own use, which was the essence of the case against him. Of that he was found not guilty. Of the fourteen specifications under charge I he was found not guilty of eight, guilty of five, and of the remaining one guilty with a qualification, which nullified the finding.

He was found guilty of the first and fifth specifications

under charge I, with the qualification already stated, that he was not guilty of any misappropriation of funds to his own use; and he was also found guilty, with a similar qualification, of the fourteenth specification under charge II. These three specifications, as already stated, were for acts done in 1870. All the other specifications on which he was found guilty were for acts alleged to have been done in 1871. Then he was found guilty generally on both charges and was sentenced to be dismissed from the army, to pay a fine, and to be imprisoned.

The proceedings of the court-martial were transmitted to the Secretary of War, and he approved the findings and sentence. In the order issued by him to that effect (Record, p. 6) he stated that, in view of the gallant and meritorious conduct of the accused during the war, and in accordance with the unanimous recommendation of the court-martial, the President was pleased to remit all the sentence except so much thereof as directed cashiering. The sentence of dismissal was carried into effect and the name of the accused was dropped from the rolls of the army on January 16, 1873.

Subsequently President Grant was petitioned to review the proceedings of the court, and he referred the matter to the Judge Advocate General for a report. The Judge Advocate General examined the case and reported, in substance, that there was not sufficient testimony to convict the accused; that the charge of embezzlement was utterly without proof, and that the accused could not be held for the malfeasance of his sub-agents in not paying over money intrusted to them for payment.

No action was ever taken by President Grant on this report of the Judge Advocate General. Upon the accession of Mr. Hayes to the office of President he found the matter pending and undisposed of, and he took it up. Upon his examination of the case and of the proceedings of the court-martial he disapproved the findings and sentence, directed

the revocation of the order of Secretary Belknap by which it had been sought to carry them into effect, and ordered the restoration of Runkle's name to the rolls of the army.

This action by President Hayes was taken on August 4, 1877.

On August 15, 1877, Runkle drew pay ($9,195.27) for the period during which he had been under suspension—that is, the period between January 16, 1873, and August 4, 1877. And subsequently, up to January 1, 1884, he received $14,390.35 pay as an officer on the retired list of the army. This made $22,585.62 in all, for which the United States in this suit filed a counter-claim against Runkle.

On September 14, 1882, Runkle filed before the Second Auditor of the Treasury a claim for longevity pay under what is known as the "Tyler decision." The Second Auditor referred the matter to the Secretary of the Treasury, and the Secretary, under the second section of the act of Congress of March 3, 1883, chap. 16 (22 Stat., 485), referred it to the Court of Claims for determination upon these five questions:

1st. Was the court-martial that tried Benjamin P. Runkle duly and regularly organized, and had it jurisdiction of the person of said Runkle, and of the charges upon which he was tried?

2d. Were the proceedings and findings of said court-martial regular and the sentence duly approved in part by the President of the United States, as required by law?

3d. Was Benjamin P. Runkle legally cashiered and dismissed from the Army of the United States in pursuance of said court-martial and subsequent proceedings?

4th. Was the President of the United States authorized and empowered by executive order to restore said Runkle to the army as is claimed he was restored by the order of August 4, 1877?

5th. Is Benjamin P. Runkle now a retired army officer, with the rank of major, and, as such officer, entitled to longevity pay under what is known as the "Tyler decision?"

Proceedings were thereupon had in the Court of Claims, and that Court found the facts substantially as here stated, and thereupon it deduced three conclusions of law:

1st. That the claimant was not entitled to longevity pay.

2d. That the defendants were not entitled, under their counter-claim, to recover the pay received by the claimant as a retired major, which accrued after August 4, 1877, amounting to $14,390.35.

3d. That the defendants were entitled to recover from the claimant the sum of $9,195.27, being the amount paid to him for the time between January 16, 1873, and August 4, 1877.

And upon these conclusions the Court of Claims rendered judgment against the claimant and in favor of the United States for the sum of $9,195.27. From this judgment Runkle appeals, and the United States also appeal, on the ground that they hove not been allowed the whole of their counter claim.

II.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in holding that the appellant, Runkle, was not entitled to longevity pay.

2. It erred in holding that the court-martial which tried Runkle was duly organized and had jurisdiction to try the case against him.

3. It erred in holding that the proceedings of the court-

martial had been duly reviewed and approved by the President of the United States, as required by law.

4. It erred in holding that Runkle had been legally dismissed from the army, in pursuance of the proceedings and sentence of said court-martial.

5. It erred in holding that the order of restoration issued by the President of the United States on August 4, 1877, was null and void and unauthorized by law.

6. It erred in holding that Runkle was not a retired officer of the army.

7. It erred in holding that the United States were entitled to recover from Runkle the sum of $9,195.27, or any sum whatever.

8. It erred in entering judgment in the cause.

9. It erred in divers other particulars apparent in its opinion filed in the cause.

III.

BRIEF OF ARGUMENT.

The questions of law involved in this cause may be reduced to four:

A. Did the court-martial that tried Runkle have jurisdiction in his case?

B. Were the findings of that court-martial reviewed and approved by the President of the United States, as required by law?

C. Was the action of the President taken on August 4, 1877, legal and authorized?

D. Were the United States entitled to have a judgment rendered in their favor in this suit?

A.

The first question to be considered is whether the court-martial that assumed to try Runkle was duly organized and has jurisdiction of his case.

1.

This court-martial, in its very inception, appears to have been illegally convened and constituted.

The Articles of War (Art. 72, Revised Statutes, sec. 1342), provide:

"Any general officer commanding the Army of the United States, a separate army, or a separate department, shall be competent to appoint a court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for for his approval or orders in the case."

This provision in the Revised Statutes was substantially taken from the acts of Congress of April 10, 1806 (2 Stat., 359), and May 29, 1830 (4 Stat., 417, chap. 179), which were in force in the year 1870, when the court-martial was held.

This court-martial was convened by order of the President, and not by order of the commander of the department (Record, p. 5), and therefore was not in accordance with the statute.

While the President is constitutionally the Commander-in-Chief of the Army and Navy, the Constitution devolves upon Congress exclusively the "power to make rules and regulations for the government of the land and naval forces." For this government of the land and naval forces Congress enacted the Articles of War, and they are as binding upon

the President as upon the private soldier. There is a very great difference—a difference plainly recognized in the Constitution, though it has been disregarded in this case by the Court of Claims—between the *command* of the army and the *government* of the army. The President is *commander*, deriving his power as such from the Constitution alone, and not subject in its exercise to the control of Congress; but it is for Congress alone to exercise the power of *government* of the army, and the regulation of courts-martial is unquestionably one of the functions of government, and not of command; otherwise, in attempting such regulation, Congress would trench on the constitutional prerogatives of the President.

The Court of Claims, in its opinion in this case (Record, p. —), says: "Courts-martial are the creatures of orders, the power to convene them being an attribute of command." Herein is the radical vice in the opinion of that Court. If courts-martial are the creatures of orders, and the power to convene them is an attribute of command, then the attempt of Congress to provide for them and to regulate their action is a distinct interference with the President's constitutional right to command, and the whole legislation upon this subject and the Articles of War that bear upon it are unconstitutional, null, and void. Assuredly this Court will not, at this late day, entertain any doctrine so radically revolutionary.

The argument of inconvenience adopted by the Court of Claims, that, if their conclusion was not correct, the administration of military justice would in many cases be impracticable, is an argument more plausible than substantial. It is no answer in any case, but it is especially untenable in the present instance. Because, if there are cases in relation to the army for which Congress has not provided, it is to be presumed that they are to be governed by immemorial usage on the subject.

If it be admitted, therefore, that the President had no legal

right or power to convene the court-martial in this case, the whole superstructure built upon the false assumption of such power in him must fall to the ground.

2.

But, even supposing that the court-martial in this case was legally and duly convened, what jurisdiction did it have to try the case?

It is a rule of English law that a soldier cannot be tried by a court-martial for a cause not military in its nature, or for an act to do which the officer in command has no right to order him.

See Lutter *vs.* Borden, 7 How., 1, 61.
Warden *vs.* Bailey, 4 Taunt., 65, 67.
4 Maule & Selwyn, 400.
2 Henry Blackstone, 103, 537.
Wise *vs.* Withers, 3 Cranch., 337.
Dow *vs.* Johnson, 100 U. S., 158, 188.
Capon *vs.* Austin, 7 Johnson, 96.

Singularly enough, we are perhaps less jealous of courts-martial in our country than are our brethren in England; and perhaps with us it may be that soldiers may be tried by courts-martial for causes not military in their nature. The common charge of "conduct unbecoming an officer and a gentleman" is sufficiently elastic to admit of any specifications under it that may suit the caprice of a military tribunal. But certainly, when an officer or soldier is compulsorily or illegally assigned to duties to which it is prohibited by law to assign him, alleged misconduct in the performance of such compulsory or illegal services is not a proper subject for the cognizance of a court-martial.

Most of the acts with which appellant was charged before the court-martial were alleged to have been committed after he had been placed on the retired list of the army, on De-

cember 15, 1870, though there are three specifications of acts alleged to have been done before his retirement. Now, the law in force at the time (the act of Congress of January 21, 1870, 16 Stat., 62) prohibited the assignment of retired officers of the army to any such duties as were imposed upon the appellant, and it prohibited the continuance in any such duties of retired officers previously assigned to them. Consequently, the retention of the appellant in such duties was illegal, and he was not amenable to the Articles of War for unfaithful performance of them.

The act of Congress of January 21, 1870, above referred to, provided "that no retired officer of the army shall hereafter be assigned to duty of any kind, or be entitled to receive more than the pay and allowances provided by law for retired officers of his grade, and all such assignments heretofore made shall terminate within thirty days from the passage of this act." There were subsequent modifications of this act regarding duty at the Soldiers' Home and professorships in military colleges; but, of course, they have no bearing on our present subject.

The appellant, it will be remembered, was assigned to duty in the Freedman's Bureau on April 11, 1867. He was employed in that duty on the 21st of January, 1870, the date of the passage of the act, and he continued to be so employed until he was placed under arrest, in August, 1871, although he had been put upon the retired list, as stated, on December 15, 1870. We claim that his retention in such duty after the last-mentioned date was illegal, and in violation of the prohibition of the statute.

The justice who delivered the opinion of the Court of Claims sought to show that the appellant's case was not covered by the act of January 21, 1870. His argument is that when Runkle was assigned to duty he was on the active list of the army; that there was no new assignment after he was retired, and that his case, therefore, was not either an assignment of a retired officer before or after the

act. If this argument were not found in the opinion of an eminent court it might be denominated special pleading. The plain intention of Congress, in the act under consideration, was to prohibit thereafter the employment of retired officers of the army in any duty to which army officers might be assigned. Continuance in an employment to which there was a previous assignment was, in the contemplation of that act, as much prohibited as the assignment itself. Under the rules of common sense and the purpose and intent of this statute, assignment to duty must be taken to mean not merely appointment to duty, but employment in it.

But the Court of Claims, in its opinion, further proceeds upon the theory that, if some of the acts alleged to have been done by the appellant had been done before his retirement, and there was a conviction as to them, it was of no consequence that there was a conviction also as to other acts subsequent to the retirement. This theory utterly ignores the well-settled rule of law that a judgment is one, and that a judgment void in part is wholly void. (See Freeman on Judgments, sec. 136, and cases there cited.) And especially is this the case with these courts of inferior and limited jurisdiction, and where, as in the present instance, it is impossible to tell how far any particular specifications entered into the final judgment.

The deduction from all this is that Major Runkle's detention on duty in the Freedman's Bureau after December 15, 1870, was illegal and compulsory; that for acts done by him of alleged malfeasance in connection with such duties he was not amenable to a court-martial, and that, therefore, the court-martial was without jurisdiction in the premises.

B.

We are next to consider whether, even if this court-martial was duly convened, and its proceedings and sentence were regular, and it had jurisdiction of the case, those proceedings

and that sentence were ever reviewed by the President of the United States, as required by law, before they could become effective.

Article 92 of the Articles of War, already cited, provides that the proceedings and findings of courts-martial appointed by the President "shall be sent directly to the Secretary of War, *by whom they shall be laid before the President for his approval or orders in the case;*" and article 106 of the same articles provides that "in time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President."

It is almost superfluous to recall such an elementary rule of law as that the action of courts of limited and inferior jurisdiction, such as this court-martial was, even with the President himself as part of the machinery for the administration of military justice, must appear *affirmatively*, and that nothing is presumed in their favor and nothing is to be taken to have been done by them unless it is made to appear to have been done. Review by the President of the proceedings of the court-martial in this case and his approval of the sentence were essential prerequisites to the efficacy of that sentence. Now, there is nothing whatever in the record, from beginning to end, to show that the President of the United States ever reviewed this case, or ever even knew anything of it, until after the order of dismissal of the appellant from the army by Secretary Belknap.

The only action ever taken upon it was taken by the Secretary of War (Rec., p. 6), and there is nowhere the remotest allusion to Presidential action, except in the last clause of the Secretary's order, where it is recited that, in consequence of certain considerations, "the President is pleased to remit all of the sentence except so much thereof as directs cashiering."

Now, we do not ask, as the Court of Claims seems to intimate that we do, that there shall have been any formal

entry of judgment, of approval or disapproval, over the President's personal signature, though this may well have been contemplated by the statute; neither do we require that his personal signature should appear to any order in the case; but it should certainly appear, not by implication, not by inference, not by suggestion, not by supposition, but affirmatively and positively, on the record or by oral testimony, that the President—the President himself, and not his Secretary—had taken the action which the law requires to have been personally taken by him.

Authorities are cited in support of the position that the Secretary of War is empowered and authorized to perform such duties as may be intrusted to him by the President relative to the military forces of the United States, and that his acts in the conduct of the War Department are to be presumed to be the acts of the President. No authorities are needed in support of that position. We do not controvert it. But when a statute specially directs that the proceedings of a court-martial must be sent directly to the Secretary of War, and that the Secretary of War must lay them before the President for direct personal approval or order by the President himself, any man of average intelligence would undoubtedly conclude that the Secretary of War in such a case was prohibited from acting as the organ of the President or in his name, and that special judicial power was here conferred upon the President, which he was plainly precluded from delegating to the Secretary of War or any one else.

The opinion of the Court below proceeds farther to say:

"We might go further and point to what seems to us to be incontrovertible internal evidence in Secretary Belknap's order of its expressing not his, but President Grant's, decision; but this opinion has been extended to such length that we forbear to discuss that subject." (Rec., p. 18.)

This dismisses an important point in the case very cavalierly. If the statement contained in the order of the Secretary of War that "the President is pleased to remit all of the sentence except so much thereof as directs cashiering" constitutes "incontrovertible internal evidence—and we fail to find any other evidence of any kind in it—that President Grant reviewed and approved the sentence of the court martial, we have nothing further to say upon that point. But we fail to see how it constitutes such evidence, or any evidence whatever, of that which should appear distinctly and affirmatively as a positive fact. There is equally "incontrovertible internal evidence" in the statement of President Hayes (Record, p. 7) that President Grant never did review or approve, or in any manner act upon, the proceedings of that court-martial. And how easy it was, with the testimony of President Grant himself, and that of Mr. Belknap, so easily to be had, to show a fact, if fact it was, so essential in this case! But not the slightest attempt was made on behalf of the United States to establish any such fact, and therefore we are justified in concluding that there was no such fact to be established.

C.

In the next place, if President Grant never reviewed or acted on the proceedings of this court-martial, the order of Secretary Belknap of January 16, 1873, dismissing the appellant from the army, was an utter nullity, and the appellant never legally ceased to be an officer of the army on the retired list. And it likewise follows that, if President Grant never acted upon the proceedings of the court-martial, the legality of the action of President Hayes in so doing is beyond question.

The action of President Hayes was not, as is sought to be shown, an attempt to revise and undo the action of his predecessor, nor did it purport to be anything of the kind. It was simply the taking up and concluding of a matter of

unfinished business left over to him by his predecessor and upon which it was perfectly competent for him to act. The so-called *restoration* by him of Runkle to the army was merely a recognition of the fact that Runkle had never legally ceased to be an officer of the army.

D.

One other question remains to be considered: Were the United States entitled to have judgment rendered in their favor in this case?

This payment to Runkle was a voluntary payment, and as such it cannot be recovered back. If there was any mistake or error in the payment to him, which, of course, we do not admit, it was a mistake of law, and it is well settled that in a case of voluntary payment by mere mistake of law no action will lie to recover back the money.

Elliott *vs.* Swartwout, 10 Peters, 137.
Barney *vs.* Watson, 92 U. S., 449, 451.
Cox *vs.* Lott, 12 Wall., 209.
Nicholl *vs.* United States, 7 Wall., 128.
Philadelphia *vs.* Diehl, 5 Wall., 732.

E.

The appellant, therefore, respectfully submits that the judgment of the Court of Claims in this case ought to be reversed.

M. F. Morris,
For Appellant Runkle.

122-543

APR 22 1887

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

Nos. 259 and 260.
Benjamin P. Runkle, Appellant,
vs.
The United States.

Appeal from the Court of Claims.

ARGUMENT BY GEO. W. McCRARY,

Of Council for Appellant in No. 259 and Appelle in No 260.

Citizen and Gazette Print, Urbana, Ohio.

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The United States.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

MAY IT PLEASE THE COURT:—

The proceedings against Major Runkle were void, because the Court-Martial *had no jurisdiction.*

He was a citizen of Ohio, employed as a clerk in the Freedmen's Bureau. He was an officer on the retired list after December 15th, 1870, it is true; but this did not give a Court-Martial jurisdiction over him in a case in which no military offense was charged. The charge was misconduct in the performance of duty in the Freedmen's Bureau. In the performance of that duty he was acting as a soldier, in the discharge of military duty, or he was not.

If he was not, he was entitled under the Constitution to trial by jury, and was not subject to trial by Court-Martial. This is a right of which he could not be deprived, except in a case "arising in the land or naval forces." *Constitution 5th and 6th amendments. Also Art. 3, Sec. 2.*

No doubt an officer of the army on the retired list is subject to the jurisdiction of Courts-Martial, *but for what class of offences?* Clearly not for *all* offenses he may commit. Not surely for an assault and battery committed upon a citizen not at or near a military post. Not for cheating or defrauding a neighbor in a bargain. Not

for a fraud upon the Government committed while dealing with or for the Government in a purely civil capacity. A retired officer sometimes acts in the capacity of an officer of the army as for example when he draws his pay, or when he is assigned to duty at the Soldiers' Home, or as a professor in a college (U. S. Rev. Statutes, Secs. 1259 and 1260.) In these instances he would be acting in a military capacity and amenable to military law. But retired officers are permitted to engage in business, to practice law, to act as cashiers of banks and to accept civil office. When acting in any of these capacities they act as citizens, and are entitled to *all the rights* of citizens. Should a military court attempt to try a retired officer for acts done while acting in any of these capacities, it would not be claimed that its proceedings would have any validity whatever. But it is said that Major Runkle *was ordered by the War Department to do clerical duty in the Freedmen's Bureau.* If so the order was after December 15, 1870, utterly void because in direct violation of the Statute.

By the Act of Congress of January, 21, 1870, 16th Statutes at Large, p. 62, it was provided:

"That no retired officer of the army shall hereafter be *assigned to duty of any kind* * * * * and all such assignments heretofore made *shall terminate within thirty days from the passage of this act.*" See also Rev. Statutes, Sec. 1259.

A retired officer is liable to trial by Court-Martial *for a military offense*, i. e., an offense committed by him *when acting as a part of the army or in his military capacity.* In what capacity is he acting when compelled to do duty in violation of law? Suppose a citizen be kidnapped and carried to a military camp and placed with the army in violation of law. Could he be tried by Court-Martial for an offense committed while with the army? Certainly not, and for the plain reason that he would not by such a proceeding become a part of the military forces.

The act of ordering a retired officer to do duty in violation of the statute above quoted, may not be as great an outrage as to kidnap a citizen for the same purpose, *but the one is as clearly illegal and void as the other.*

An order assigning a retired officer to duty in direct violation of the act of Congress, is certainly as wanting in every element of validity as would be an order assigning a civilian to the same duty.

It must follow then that Major Runkle was not in the performance of military duty at the time of the alleged offense. He was, therefore, acting as a citizen and entitled to the rights of a citizen. He stood in the position of a civilian clerk employed by the War Department.

The only thing that distinguishes his case from that of a civilian clerk is the order above referred to, which was of no force or effect and is not to be regarded. Such clerks are not amenable to Court-Martial jurisdiction—*16 Opinions of Attorney-General's, 13 and 48.*

The record shows that Major Runkle was employed in a purely civil capacity. His duties were clerical and financial. They had nothing to do with the army or military forces—but related exclusively to the care of the freed men.

The right of trial by jury is preserved to every one accused of crime who is not *attached* to the army or navy or militia in active service.

Courts-Martial may try persons "for offenses committed *while the party is in the military or naval service.*" "Every one *connected with* these branches of the public service is amenable to the jurisdiction which Congress has created for their Government, and *while thus serving* surrenders his right to be tried by the civil courts." *Exparte Milligan 4, Wall 122 and 123.* The party accused must be *in* the army or *attached* to it and must commit the offense charged *while thus serving.* It is not enough that he be in the discharge of purely civil duties in time of peace though under orders of the military authorities especially if those orders be unlawful and void. *The War Department could not acquire jurisdiction to try Major Runkle by an order issued in violation of the statutes.*

The judgment of a Court-Martial may be collaterally attacked for want of jurisdiction. If the court went beyond its jurisdiction, judgment and sentence even if approved by the President were null and void.

Wise *vs.* Withers. 3 Cranch 331.

Dynes. *vs.* Hoover. 20 How. 82.

Wilcox *vs.* Jackson. 13 Pet. 510 and 511.

This point was not overlooked by the Court of Claims, but I submit that in discussing it that court fell into grave error both of fact and law.

It is first suggested in the opinion of that court that possibly the act of Congress had no application to a retired officer who had been assigned to duty prior to its passage and was retained on duty thereafter. It is scarcely necessary to notice this suggestion, inasmuch as the act expressly provides that all assignments of retired officers to duty, made before its passage, shall "terminate within thirty days from the passage of this act." The act of continuing a retired officer on duty was therefore as clearly prohibited as the act of assigning such an officer to duty. The purpose of Congress was to put an end to the employment of retired officers by the army, or with the army, and to accomplish this purpose the retired officers then on duty were ordered to be discharged, and the assignment of such officers thereafter was forbidden. Indeed every officer in the army is constantly acting under orders. The retention of Major Runkle in service after the expiration of thirty days from the passage of the act above cited was *in violation of both provisions of that act.* It was an unlawful detention of that officer in the military service in violation of the act, and it was to all intents and purposes equivalent to an order requiring him to continue on duty. At all events he was not lawfully on duty after the expiration of the period fixed by the act. This much is certainly abundantly clear.

In the opinion of the court below it is said upon this question:

"This objection is founded on the assumed fact, that the offenses "charged against the Appallent, and of which he was convicted, "were committed *after he was retired*, and therefore that the court "had no jurisdiction of them. If this were wholly true in fact, we "might have to meet the question now raised, but it is not wholly "true. Under Charge I there were two specifications, (the 1st and "5th,) and under Charge II there was one (the 14th,) each aver- "ring acts done by him in 1870, *before he was retired;* and of those "three specifications he was found guilty, as he was also of both "charges. This was enough to uphold the sentence of the court, "for those specifications related to a time when there was not the "least ground for disputing the right of the court to try him on "them under those charges."

The Court of Claims here falls into an error of fact, and one which does the Appellant great injustice. Major Runkle was not found guilty of the three specifications based upon transactions alleged to have been prior to his discharge. The finding of the Court-Martial upon the specifications and charges was *not guilty* as to the material and grave matters therein contained, and they ex-

honorated Major Runkle completely from the charge of misappropriating any of the public funds entrusted to his care. (See record of Court-Martial proceedings, charges, specifications and findings.)

Let us assume however, *pro argumento*, that the court below was right as to the fact. How then stands the case? The Court-Martial found Major Runkle guilty upon eighteen specifications. It had (as we assume) jurisdiction of *three* of these, and no jurisdiction of the remaining *fifteen*. *It pronounced one sentence upon all these specifications.* This presents the question whether a court can lawfully pronounce a single judgment and sentence upon eighteen charges, because it may happen to have jurisdiction of three of such charges. The court below was of the opinion that if the Court-Martial had jurisdiction of the three specifications alleging offenses prior to Major Runkle's retirement, this would give the court power to try him upon the fifteen charges of which it had no jurisdiction, or at least would render valid the sentence based upon the entire eighteen. The court said:

"This was enough to uphold the sentence of the court, for these specifications (the three above referred to) related to a time when there was not the least ground for disputing the right of the court to try him on them under those charges."

This seems to me, with all due respect to the Court of Claims, plainly unsound in law, unjust in morals, and illogical in argument.

If it be sound, then, although fifteen eighteenths of the sentence may be void, yet the unfortunate party accused must suffer the whole punishment because three eighteenths of the subject matter was within the court's jurisdiction. How can any court assume that the punishment would have been, or ought to have been the same, if the fifteen specifications over which the court had no jurisdiction had been eliminated from the case?

Such a sentence is void *in toto*.

Ex parte Lange, 18 Wall., 163.

In that case the court exceeded its jurisdiction and pronounced a sentence which was in part based upon matters within, and in part upon matter without its jurisdiction. The accused in that case had been tried and sentenced for an offense for which he was liable to the alternative punishment of fine *or* imprisonment. The court imposed both, and the sentence was held void. It is therefore exactly in point. In the course of the opinion, this court, by Mr. Justice Miller, said (pages 175 and 176:)

"But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void."

"But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes."

And again on pages 176 and 177:

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a Justice of the Peace having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, *because in excess of the authority of the court*, and forbidden by the Constitution."

It is also suggested in the opinion of the Court of Claims that the Court-Martial had jurisdiction under Sec. 18 of the act of August 3, 1861, "providing for the better organization of the military establishment" (12 Statutes at Large, 290,) which provides: "That officers partially retired * * * shall be subject to the rules and articles of war and to trial by General Court-Martial for any breach of the said articles." If this statute shall be construed to subject retired officers to trial by Court-Martial for all offenses, whether arising in the land or naval forces or not, and whether committed by a person connected with the military service, and while acting in a military capacity or not, it is clearly unconstitutional under the 5th and 6th amendments of the Constitution, as construed in the case of Ex parte Wallace 2, because it would deprive persons of the right [illegible] cases where no military offense is charged. This [illegible] shown.

[illegible] strued so as to conform to the Constitu- [illegible] simply means that retired officers are

amenable to the military law, and subject to the jurisdiction of military courts *for military offenses*, that is to say, such offenses as are not indictable. Said this court in the Milligan case:

"The framers of the Constitution doubtless intended to limit the right of trial by jury in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." A retired officer is a citizen, and as such undoubtedly liable to indictment and trial under the criminal laws of the states, or the United States, for all offenses not committed while acting in a military capacity, or in other words, *arising in the military service.*

Again, the statute under which Major Runkle was arraigned and tried before the Court-Martial, and which he was charged with violating (Act. of March 3, 1863, Chap. 67, Sec. 1,) applied by its very terms only to "any person *in the military service of the United States.*" I have shown, I think clearly, that he was not, in contemplation of law or in fact, in the military service, because under the statute he could not be.

The Court-Martial before which Maior Runkle was tried was *not appointed by proper authority*, and hence its proceedings and sentence were void.

The Act of Congress of April 10, 1806, [2 Stat. 357, Ch. 20. See 65,] provided as follows:

"Any general officer commanding an army, or Colonel com-"manding a separate department, may appoint General Courts-"Martial when necessary."

And the Act of Congress of May 29th, 1830, [4 Stat. L. 417, Ch. 179] provided.

"SEC. 1. Whenever a general officer commanding an army, or "Colonel commanding a separate department shall be the accuser "or prosecutor of any officer in the army of the United States, un-"der his command, the General Court-Martial for the trial of such "officer shall be appointed by the President of the United States.

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"But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void."

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The statute must be construed so as to conform to the Constitution, and thus construed it simply means that retired officers are

amenable to the military law, and subject to the jurisdiction of military courts *for military offenses*, that is to say, such offenses as are not indictable. Said this court in the Milligan case:

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"SEC. 3. So much of the sixty-fifth article of the first section of "the act for establishing rules and articles for the government of

"the armies of the United States,' passed on the 10th of April, "1826, as is repugnant hereto, be, and the same is hereby, re- "pealed."

When it is remembered that these were penal statutes and that they provided for the constitution of courts with power to deal with liberty and life as well as property and honor, their construction cannot be difficult. The President is authorized to appoint a Court-Martial only in case the general officer commanding the army or department is the accuser. If such commander is not the accuser he alone is authorized to appoint the court. In the present case the department commander was not the accuser, and he did not appoint the court. It was appointed by the Secretary of War under authority of the President.

If the above statute is constitutional it is an end of the controversy. But the power of the President to appoint Courts-Martial is claimed as a power conferred upon him by the Constitution which creates him Commander-in-Chief of the Army.

It is doubtful whether the power to appoint Courts-Martial is in the absence of statute necessarily one of the functions of command; but the point may be waived for the purpose of this inquiry. The same Constitution which empowers the President to command the army, authorizes "Congress" to make rules and regulations for the government of the land and naval forces.

Constitution Art. 1, Sec. 8.

In pursuance of this power Congress enacted as part of the rules and regulations for the government of the army, the statutes above quoted. Nothing can be plainer or more self evident than the proposition that the President must govern the army in accordance with such rules and regulations for its government as Congress may prescribe. Rules respecting the appointment of Courts-Martial are pre-eminently rules for the *government* of the army, and therefore come clearly within the power of Congress. The Constitution plainly distinguishes the *government* of the army, from the *command* of the army. Congress may make rules for the former but not for the latter. The *command* of the army is entrusted to the President; but the *government* of the army is provided for by a code of military laws provided by Congress administered and enforced through the medium of military courts. The appointment of such courts is a part of the government of the army and therefore plainly a matter to be regulated by

Congress. The army is *commanded* by the President, and in the exercise of the function of command he is independent of Congress. He must *govern* according to the rules and regulations prescribed by Congress. He may command according to his own judgment and discretion. It is not doubted that the President posseses authority under the Constitution which could not be taken away by Congress. Congress could not for example, direct him to station troops in particular places or to conduct a campaign in a particular manner. In other words Congress could not interfere with the *command* of the Army by the President. But when we come to the *government* of the Army, which includes such matters as the trial and punishment of offenders, the appointment of military courts for these purposes, the approval and execution of their sentences and the like, we come within the domain of the rules and regulations to be provided by Congress. It follows that the statutes above quoted are Constitutional and binding upon the President of the United States, as much as upon the humblest private soldier. It requires no argument to show that the proceedings and sentence of a court-martial not appointed by competent authority are absolutely null and void.

It has been said that cases can be found in which the President *exercised* the power of appointing courts-martial prior to the passage of the act regulating such appointments, and the inference has been drawn that he may continue to do so now that he is, by the necessary implication of the statute, prohibited from making such appointments except in cases where the Department Commander is the accuser.

In answer to this it may be said.

1. That the custom of the President does not make the law, and
2. If it did the manifest purpose of the statute was to *abolish* such custom.

The statute empowers "any General officer commanding the Army of the U. S., a separate Army, or a separate department" to appoint courts-martial but adds the following: "But when any such Commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President &c." The plain meaning is that the President shall appoint only in cases where the commanding General is disqualified. This is in pursuance of a wise and humane policy. The President resides in Washington. He cannot be presumed to be familiar with the

merits of charges, or accusations against soldiers in the field or garrison; but the General in command is on the ground, familiar with the facts, and of all men the best fitted to select the court, unless in the exceptional cases in which he is the accuser, in which case the President is authorized to act.

Suppose a statute should authorize the District Judge to appoint a jury to assess damages in a *given class* of cases with a proviso that in case of his being interested, a Judge of the Supreme Court should make such appointment, would any lawyer say that the latter could act in any save the case specified?

If therefore it were admitted, which it is not, that prior to the enactment of these statutes the President could as Commander-in-Chief of the Army appoint courts-martial it is clear that his power was limited and curtailed by the enactment of these statutes, unless it be held that Congress had no power to determine by whom such courts are to be appointed. When in the exercise of its power Congress has said that in a certain class of cases, courts-martial shall be appointed by the commanding General all other authority is excluded. Especially is this so where authority is vested in the President in another class of cases upon the ground, and for the express reason, that the Generals being accusers cannot properly act.

The sentence pronounced against Major Runkle was never approved as required by law and army regulations.

See 65th Article of War, Act of April 10th, 1806, in force when the trial was had. Also paragraph 896, Army Regulations, and as explanatory of the policy of the law, see later Acts embodied in Articles of War, No. 104 and 106, R. S. page 230.

It will not be claimed that the confirmation by the President may be dispensed with, but it has been said that such approval must be inferred from the endorsement on the record showing an approval by the Secretary of War, or if not that the fact of approval may be shown by parol.

It is hardly necessary to argue the proposition, that approval by the Secretary, is not sufficient. The power of approval is a judicial power. It is a judicial function of the highest character, often in-

volving the question of life or death, and always involving a soldier's honor which is more to him than life. It may be argued with some plausability that the President's signature is not necessary and that if the Secretary certifies that the record was laid before the President and by him approved, it is enough, but can it be claimed upon any valid reason that the word "approved" with the signature of the Secretary necessarily implies that the President has examined and approved. In construing the record of a criminal trial no such loose assumption of facts can be safely indulged in. Nothing can be taken by intendment. Even in civil cases the record must speak for itself and nothing can be added by parol.

Wharton on evidence, Sec. 980, and many authorities cited in note.

The other claim will be that if the record does not show approval by the President, parol proof may be offered to show such approval. Surely this cannot be so. The most important fact in the whole proceeding, the one upon which everything depends, is the fact of the President's approval. If this can be shown by parol what need of a record to show anything. The appointment of the Court, the the names of the officers composing it, the fact that they were sworn, the arraignment of the prisoner, his plea, the names of witnesses examined and what they testified to, are all matters of less moment than the approval of the proceedings and sentence by the President. If the latter may now be inquired into upon parol evidence any or all of the others may be. The proceeding of the Supreme Court of the United States might as well be evidenced by the parol testimony of witnesses as the action of the President in such a case.

Paragraph 896 of the Army Regulations, which has the force of law, declares that the officer having authority to confirm sentence (in this case the President,) "shall state at the end of the proceed-"ing in each case, his decisions and orders thereon." From this two things must be admitted.

1st. That the statement "at the end of the proceedings" must be in writing; and

2d. That it must prove itself and cannot be supplemented enlarged by parol.

Respectfully submitted,

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